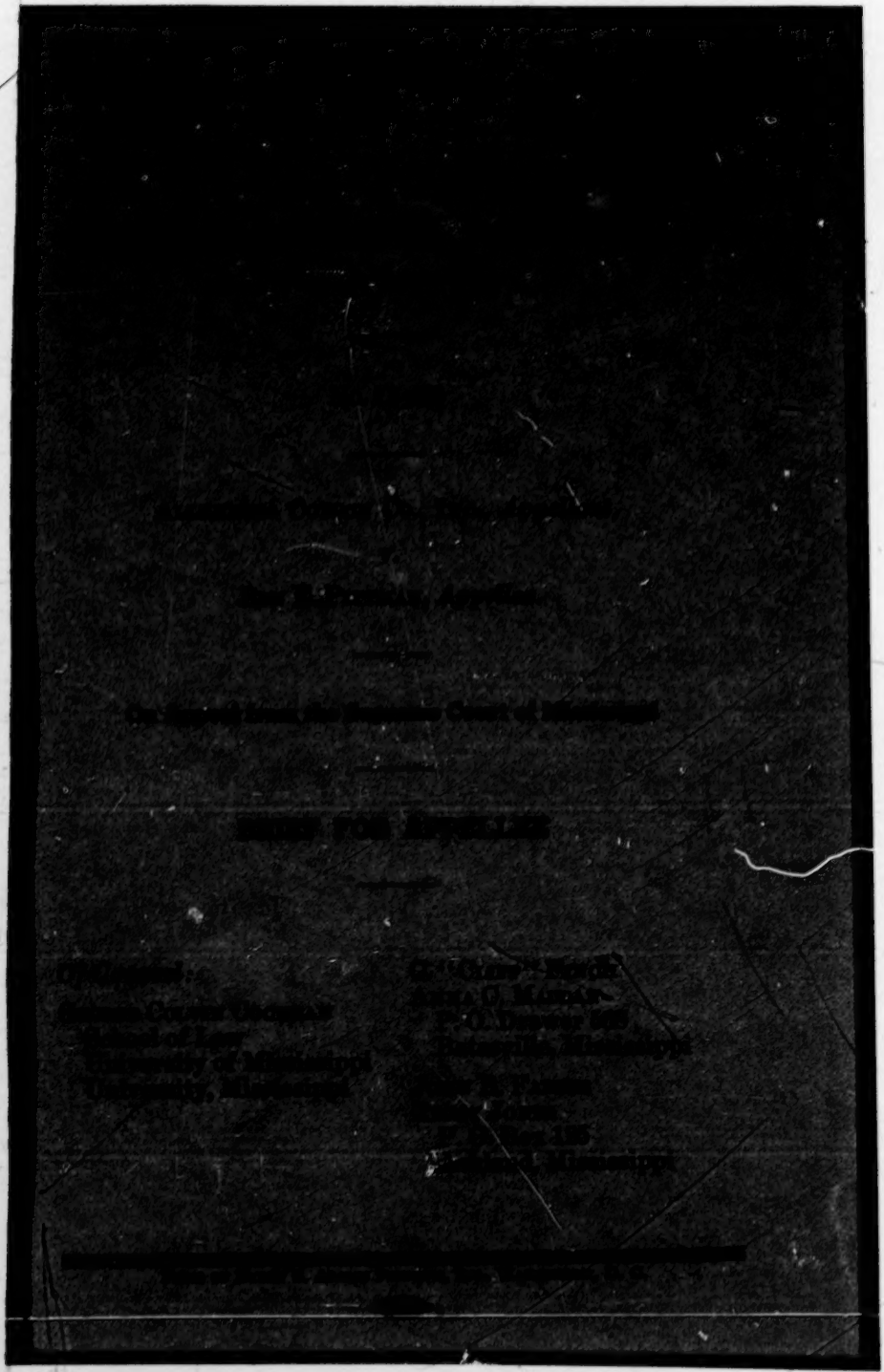

INDEX

AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-628

ALLENBERG COTTON CO., INC., *Appellant,*

v.

BEN E. PITTMAN, *Appellee.*

On Appeal from the Supreme Court of Mississippi

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

I

Whether a foreign corporation engaged in buying and selling cotton which utilizes contracts calling for intrastate delivery to local warehouses where the cotton, now owned by the corporation, is stored pending shipment, may be required to qualify.

II

Whether this Court may review a state court decision interpreting a state statute in the context of state court decisions without a federal question being timely raised.

STATUTES INVOLVED

Relevant sections of the Mississippi Code are reprinted in Appendix A.

STATEMENT

Allenberg Cotton Company was incorporated in Tennessee in 1946. (A. 35) Its authorized activities include "carrying on the business of cotton merchants including the buying and selling of spot cotton, the dealing in cotton futures, the storing, warehousing, insuring, and hedging of cotton and cotton sales or purchases . . . ." (A. 35-6) The company's principal office is in Memphis (A. 93) and its business activities extend throughout the southern and southwestern United States. (A. 70, 77)

On November 10, 1971, Ben Pittman, a resident of Quitman County, Mississippi, entered into a contract to sell his cotton crop to Allenberg. Delivery was to be made at the Federal Compress and Warehouse Company in Marks, Mississippi. (A. 5-9) Upon delivery Pittman was to be paid the agreed-upon price and title transferred to Allenberg. *Ibid.* Allenberg's suit to enforce the contract gives rise to the instant case.

Cotton purchased through agents (A. 49, 72) by Allenberg under contracts similar to that of Ben Pittman in Mississippi for 1971 amounted to some 25,000 bales. (A. 71-72) This became part of a "perpetual inventory" (A. 92) of cotton stored in warehouses [1] throughout the state awaiting shipping orders originating in Memphis. (A. 93)

The contract utilized by Allenberg provides that costs incurred through ginning (cleaning) and delivery are borne by the farmer up to the "date of invoice." (A. 7) Costs of preparing bales for shipment (compressing) are not in-

[1] Referred to as "cotton concentration" points by Appellant. *Brief for Appellant* 11.

cluded. Finally, Allenberg delegates the following functions to Mississippi warehousemen:

> The actual picking out of the bales of cotton, tagging and marking them for shipment, loading the bales into cars and taking out the bill of lading are functions performed by warehousemen at the direction of the cotton merchant [in Memphis]. [*Brief for Appellant* 12.]

SUMMARY OF ARGUMENT

Coe v. *Errol*, 116 U.S. 517, established the basic constitutional proposition that goods awaiting shipment in interstate commerce remain "with the general mass of property" of a state and under the protection of its laws, *i.e.*, until placed on a carrier or started on their final journey they are not in interstate commerce. The most recent decision defining "intrastate" activities for purposes of qualification, *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276, equates qualification with the imposition of excise taxes. Two decisions, springing from *Coe*, unequivocally hold that cotton buying and warehousing (business activities occurring prior to shipment and engaged in by Allenberg) can be subjected to such taxes. *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17; *Chassinol* v. *Greenwood*, 291 U.S. 584. They are determinative of the instant case.

The case preceding *Eli Lilly*, *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, was an unanimous decision written by Mr. Justice Frankfurter upholding a state qualification scheme as an exercise of state regulatory power. The decision establishes that a finding of "localized" activities by a company engaged in purely interstate and foreign commerce is sufficient for the imposition of a regulatory scheme "general in scope" and not "aimed at interstate and foreign commerce." Allenberg has "localized" its business by: (1) employing commissioned agents to purchase cotton; (2) entering into contracts with Mississippi farmers for intrastate delivery of their crop; and (3) establishing an agency relationship with Mississippi warehousemen for the

storage and ultimate placement of cotton on interstate carriers. The Mississippi Business Code is informational in nature and not aimed at interstate commerce. The requirements of *Union Brokerage* are therefore established in this case.

Finally, the Court lacks jurisdiction over the instant appeal. The Mississippi Supreme Court limited its analysis to an interpretation of a state statute through the utilization of state court decisions. Since the federal question was not timely raised, the decision must therefore be construed to rest on an adequate and independent state ground.

ARGUMENT

I. THE STATUTE IN QUESTION

The Court has entertained only two cases involving foreign[2] corporations and state qualification statutes in the past thirty-two years. *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276; *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202.[3] While other portions of the brief deal with the current status and utilization of these statutes by the various states, the Mississippi penalty provision denying access to state courts deserves threshold analysis.

Techniques devised to insure qualification by foreign corporations vary widely.[4] In at least two of the states in

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[2] As the term is used in this brief, a corporation is considered "foreign" in every state other than that of its incorporation.

[3] In addition to holding that under Guaranty Trust v. York, 326 U.S. 99, state penalties imposed on nonqualifying corporations are binding on federal courts hearing diversity suits. Woods v. Interstate Realty, 337 U.S. 535.

[4] For an early analysis see Note, *Contracts of Foreign Corporations Made Before Compliance with Local Statutory Conditions*, 11 COLUM L. REV. 779 (1911). The latest major detailed presentations are found in Note, *The Legal Consequences of Failure to Comply with Domestication Statutes*, 110 U. PA. L. REV. 241 (1961), and Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 COLUM. L. REV. 117 (1963).

which Allenberg has qualified (*after* the decision of the lower court with respect to the Company's activities in Mississippi),[5] corporate officers, directors and agents are subject to incarceration for a period up to twelve months.[6] Levels of penalties in a subjectively descendent order (obviously variable with respect to the transaction involved)[7] include: declaring contracts made before compliance void;[8] injunctions;[9] denial of the right to enforce contracts in state court made prior to qualification (as in Mississippi);[10] denial of the benefit of the state's statute of limitations;[11]

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[5] The decision of the Mississippi Supreme Court became final on May 14, 1973. Allenberg qualified in Alabama on September 6, 1973, and in Louisiana on September 14, 1973. Other states also indicate qualification subsequent to the lower court decision. *E.g.*, Texas (October 29, 1973); Arkansas (September 4, 1973); Missouri (September, 1973); North Carolina (October 30, 1973); South Carolina (September 14, 1973). See *Motion to Dismiss or Affirm*, Appendix A.

[6] ALA. CODE tit. 10, ch. 1A, § 94 (1958) (12 months); LA REV. STAT. ANN. § 12:315 (1969). Other provisions relating to jail sentences: FLA. STAT. ANN. § 613.01 (1956); MICH. COMP. LAWS ANN. § 450.96 (1973); OHIO REV. CODE ANN. § 1703.99 (Page 1964); OKLA. STAT. ANN. TIT. 18, § 1.238 (1953); ORE. REV. STAT. § 57.994 (1971).

[7] As demonstrated in the instant case. If Allenberg's contract was, for say, $200.00, the punishment imposed becomes proportionately less.

[8] See *e.g.*, ARK. STAT. ANN. 10-482 (1956) (voids all corporate acts); MONT. REV. CODE ANN. § 15-1703 (1955).

[9] *E.g.*, KAN. STAT. ANN. § 17-7308 (Supp. 1972); 1 ME. REV. STAT. ANN. tit. 13A § 1211 (Supp. 1973); MASS. GEN. LAWS ANN. Ch. 181 § 19 (1958).

[10] ALA. CODE tit. 10, ch. 1A, § 89 (1958) (imposed in addition to jail sentences, note 6, *supra*); ARIZ. REV. STAT. ANN. § 10-482 (1956); ARK. STAT. ANN. § 64-1202 (1966); VT. STAT. ANN. tit. 10, § 2120 (1973).

[11] IDAHO CODE § 30-509 (1967); MD. CODE ANN. art. 23, § 93 (1973); NEV. REV. STAT. § 80.220 (1967).

and the imposition of various levels of penalties through fines.[12] To evaluate the effectiveness of these and other measures, the *Columbia Law Review* conducted a survey. One conclusion:

> In an evaluation of corporate and individual penalties, the extent to which they are enforced is, of course, a relevant consideration. In most states the provisions are largely unenforced; indeed, in the *Survey* only seven of the thirty-six responding states indicated anything resembling active enforcement. Nonenforcement is due in large part to the failure to discover offending corporations, both because of a lack of personnel with which to police the provision and because of the difficulty involved in determining when a corporation is transacting local business. [Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation,* 63 COLUM. L. REV. 117, 122-23 (1963).]

With respect to a denial of the use of state courts:

> The broadest and most effective sanction provided for noncompliance . . . is the refusal to allow use of state courts for actions instituted by an unlicensed corporation. . . . In principle, denial of the use of state courts is equitable, because deprivation of benefits normally granted by the state is a commensurate sanction for failure to accept the reciprocal burdens prescribed by the state. Moreover, it is perhaps the most effective sanction currently employed, since it depends for its enforcement on adversarial parties who have both an opportunity for knowledge of the illegal activity and reason to raise the objection. *Because of the difficulties involved in discovery and enforcement by state officials, denial of access to state courts is an essential element of a statutory scheme designed to encourage compliance with qualification requirements.* [*Id.* at 126, 129-30. (Emphasis added.)]

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[12] *E.g.*, OHIO REV. CODE ANN. §§ 1703.99,-.71,-.99 (Page 1964) ($10,000); ALA. CODE tit. 10, ch. 1A§ 21 (92) (1958) ($1,000); ALASKA STAT. § 10.05.771 (1968) (10% of past taxes owed); CONN. GEN. STAT. ANN. § 33-412 (1960) ($500).

A division of opinion exists with respect to statutes (like Mississippi's) denying the right to sue on debts *antecedent* to the time of qualification.[13] Those arguing against such statutes point to resulting "windfalls" for some who deal with an unregistered corporation. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 538, 539-40 (1949) (Jackson J., dissenting) Comment, *Foreign Corporations—State Boundaries For National Business*, 59 YALE L. J. 736, 746 (1950).[14] The argument in favor is described by the *Pennsylvania Law Review:*

> Several consequences may follow [when foreign corporations are permitted to sue for debts incurred prior to qualification] . . . . For one, foreign corporations may be encouraged to do intrastate business while undomesticated, assuming the risk that if they eventually need the services of local courts they may have to pay a penalty and accrued fees. The disability, [however], need be of concern only if it is invoked in litigation. For another, a statute which merely defers the time of trial and provides a local citizen with no substantive defense against a foreign corporation is not likely to be invoked with regularity. Such a statute fails as a weapon when the state delegates its enforcement to defendants, since they cannot be relied upon to abate suits, if delay is not in their best interests. *Thus, corporate offenders, both the crafty and the inadvertent,*

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[13] A majority of states and the District of Columbia allow the corporation to bring suit upon subsequent filing. See *Statutory Restrictions on Enforcement of Contracts*, 23 CORP. J. 323, 324 (1963); Note, *Right of a Foreign Corporation to Sue Upon Contracts in Montana Courts—Doing Business—Failure to Qualify—Subsequent Qualification*, 26 MONT. L. REV. 218 (1965).

[14] *Cf.*, Note, *Foreign Corporations: The Interrelation of Jurisdiction & Qualification*, 33 IND. L. J. 358, 371 (1958): "Furthermore, the doing business for qualification issue arises when an unqualified corporation seeks to sue, and the emotional pull is for the corporate plaintiff vis-a-vis the would-be excused defendant."

may remain undetected indefinitely—the desired information and unobtained revenue lost. [Note, *The Legal Consequences of Failure to Comply with Domestication Statutes*, 110 U. PA. L. REV. 241, 267-68 (1961). (Emphasis added.)]

The Mississippi statute can therefore be conceptualized as one delegating to citizens of the state the role of "private attorney generals," *Marvin* v. *Trout*, 199 U.S. 212; *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, hopefully providing an effective deterrent against noncomplying foreign corporations.[15] One initial determination in all noncompliance situations, however, is the presence or absence of localized (intrastate) activity; and that is what this case is all about.

II. QUALIFICATION & ALLENBERG COTTON CO., INC.

A foreign corporation engaged in purely interstate commerce within a state may conduct its business without interference from the requirements of qualification. *International Textbook* v. *Pigg*, 217 U.S. 91. It is equally well settled, however, that a foreign company engaged in interstate as well as intrastate (localized) business within a state can be required to secure a certificate of authority. *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276, 279; *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202.

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[15] The choice by the state is a political one, and not of constitutional proportions. *E.g.*, Missouri v. Lewis, 101 U.S. 22, 30 ("it is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter and amount . . . .") ; Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589-91; Paul v. Virginia, 75 U.S. (8 Wall.) 168. Critics of statutes such as Mississippi's note a double-edged sword, *i.e.*, their existence may depress "any movement to attract new industry." Note, 26 MONT. L. REV., *supra* note 12 at 277; Note, 19 ALA. L. REV. 193, 201 (1967).

A. Eli Lilly & Co. v. Sav-on-Drugs

The latest case detailing constitutional criteria for determining intrastate commerce in the context of state qualification statutes is *Eli Lilly & Co.* v. *Sav-on-Drugs, supra.* An Indiana corporation (Lilly) sold products in interstate commerce to wholesalers in New Jersey. It also maintained an office in the state for eighteen detailmen whose jobs were to promote and disseminate information about the company's products to retailers and consumers. Lilly brought suit in a New Jersey state court to enjoin a local company from selling Lilly's products below prices fixed in minimum retail-price contracts.[16] A motion to dismiss was filed by the defendant on the ground that the plaintiff was doing intrastate business in New Jersey without complying with the registration requirements of the state's corporation act.[17] Lilly opposed the motion contending that its business in the state was purely interstate.

The Court was in agreement that New Jersey's qualification requirement was to be equated with a "license."[18] 366 U.S. at 278, 282 (majority opinion); 286 (concurring opinion); 289 (dissent). In holding that Lilly was required to qualify, the majority relied on two separate findings. First, the cause of action (enjoining intrastate sales) was "entirely separable from any particular interstate activity." 366 U.S. at 282-83. Second, collateral activities of the eighteen detailmen in the state included inducing local merchants to buy goods from others and were there-

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[16] In violation of the New Jersey Fair Trade Act. N.J. REV. STAT. § 56:4-6 (1937).

[17] N.J. REV. STAT. § 14:15-4 (1937) (foreign corporation transacting business in the state without registering is denied the right to bring any action in New Jersey courts).

[18] This conclusion is in accord with earlier decisions, relating to state qualification requirements. *E.g.*, Crutcher v. Kentucky, 141 U.S. 47; International Textbook v. Pigg, 217 U.S. 91. But see Union Brokerage v. Jensen, 322 U.S. 202.

fore "intrastate" and/or sufficiently local in nature to deny the company benefits which it claimed under the commerce clause. Authority for the latter proposition was based on *Cheney Bros. Co.* v. *Massachusetts*, 246 U.S. 147, involving an excise tax sustained in a somewhat similar factual situation ("turn-over" orders). The dissent, although disturbed over the potential for intermingling tax, service of process and licensing cases, 366 U.S. at 297, relied on the "drummer" or license tax cases beginning with *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489, as authority for the proposition that Lilly was engaged in purely interstate commerce. Having equated qualification with license taxes, the former requirement (as applied to Lilly) was found to smack of the same constitutional taint, *i.e.*, "a tax imposed upon the solicitation of interstate business is a tax on interstate commerce itself." 366 U.S. at 290.[19]

B. Eli Lilly as Applied to Allenberg

The *Lilly* analysis is fully applicable to the instant case. First, the cause of action is intrastate: enforcement of a contract calling for delivery of cotton from the field to an in-state warehouse. Second, although Allenberg is involved in interstate commerce within the state of Mississippi (sales of cotton pursuant to orders from Memphis), decisions of this Court clearly demonstrate that its business possesses aspects which are definitely intrastate. These include: (1) purchasing cotton for intrastate delivery; (2) storage—for its own business purposes—in warehouses throughout the state pending shipment and/or shipment subsequent to future sale; and (3) utilization of warehousemen as agents for the performance of all necessary activities prior to placement of bales of cotton on interstate carriers.

The majority and dissent in *Lilly* agree that defining intrastate commerce for purposes of qualification requires

[19] Citing Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 392-93.

the utilization of licensing and privilege tax decisions. Two cases involving these tax classifications decided in the *exact* context of Allenberg's business are dispositive: both conclude that the incidence of the tax is on intrastate commerce.

In *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17, the validity of state excise taxes as applied to cotton warehouse and compress businesses[20] (facilities identical to those utilized by Allenberg) were attacked as interfering with interstate commerce. Rejecting the argument, the Court concluded:

> It is clear that by all accepted tests the cotton, while in [the] . . . warehouse, has not begun to move in interstate commerce and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey . . . comes to an end, and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin and so it does not become exempt from local tax until its shipment to points of destination outside the state. . . . Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. [291 U.S. at 21.]

Closer to the point is *Chassinol* v. *Greenwood*, 291 U.S. 584. As noted in the Statement of Fact, Allenberg, in accord with its corporate charter, is engaged in the buying and selling of cotton. In *Chassinol* the city imposed a *license tax* upon those engaged in Allenberg's corporate business, *i.e.*, "upon every person engaged in the business of buying and selling cotton for himself" within the city.

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[20] The statutes in question enacted "an annual license tax for the privilege of operating a cotton compress . . . [and] a similar additional tax upon each person operating a warehouse . . . ." 291 U.S. at 18-19.

291 U.S. at 585. The buyers in that case, as with Allenberg here, became absolute owners of cotton with the intention of "immediate or future delivery in other states or countries . . . ." 291 U.S. at 586. The same argument now made by Allenberg was employed:

> Chassinol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer . . . is the instrumentality by which the interstate transaction is initiated. [*Ibid.*]

Citing *Federal Compress* the Court rejected the argument:

> Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate and foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax. [291 U.S. at 587.]

Chassinol has been interpreted by the Court to stand for the clear holding that "a state is free to *license and tax intrastate buying* where the purchaser expects in the usual course of business to resell in interstate commerce." *Parker* v. *Brown*, 317 U.S. 341, 361. (Emphasis added.) Pursuant to *Lilly* the conclusion inevitably follows that Allenberg can be required to secure a certificate of qualification (a license).

The instant case (as contrasted with *Lilly*) also permits a constitutional analysis extending beyond decisions limited

to licensing and privilege taxes. As alluded to in *Chassinol*, the power of a state with respect to those exerting control over goods at rest (though destined for interstate commerce) *as well as the goods themselves* is identical. Mr. Justice Rutledge in *Independent Warehouses, Inc.* v. *Scheele*, 331 U.S. 70 (license tax; business of storing goods), describes the point:

> The authorities [previously cited] . . . generally involved property taxes . . . or other taxes upon the business of furnishing the storage facilities . . . . It would be an impermissable anomaly to hold that the goods stored may be taxed . . . but that the business of furnishing the facilities for storing them is not affected or governed legally by the same purposes, for applying the state's power of taxation. [331 U.S. at 85.]

The constitutional underpinnings for *Federal Compress* and *Chassinol* spring from *Coe* v. *Errol*, 116 U.S. 517, involving two lots of logs. With respect to the logs cut in New Hampshire and gathered to await ultimate transit on the Androscoggin for shipment to another state, the Court found that the taxing power of the state was properly exerted. After rejecting the "state of mind" of the owner as constitutionally insignificant, 116 U.S. at 525-26, the Court reviewed the activities in question in the context of when interstate commerce (and therefore immunity from direct taxation) begins:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity does not begin until the articles have been shipped or started for transportation from the one state to another. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. This is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. *Until actually launched on its way to another state, or committed to*

a common carrier for transportation to such state, its destination is not fixed and certain. [116 U.S. at 528. (Emphasis added)].[21]

The constitutional status of *Coe* is reflected by numerous holdings that goods do not cease to be part of the general mass of property within a state subject to nondiscriminatory exercises of state taxing powers until they have been shipped or "entered" with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.[22] *E.g., Superior Oil Co.* v. *Mississippi,* 280 U.S. 390 (tax on gasoline stored prior to interstate shipment); *Dept. of Treas-*

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[21] See also, Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, 475: "The conclusion in cases like this must be determined by the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does the preparatory gathering, for that purpose, at a depot. It must appear that the movement for another State has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another State." General Oil Co. v. Crain, 209 U.S. 211, 228-29: "the beginning . . . [of] interstate commerce is easy to mark . . . [as] the point in time an article is committed to a carrier . . . ."

[22] This rule, although formulated to determine the validity under the commerce clause of a nondiscriminatory state tax, is equally applicable to cases arising either under Art. I § 10, cl. 2, restricting the states in taxing imports or exports, or under Art. I, § 9, cl. 5, prohibiting Congress from laying any tax upon "articles exported from any state." Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69; Empresa Siderugica S.A. v. County of Merced, 337 U.S. 154. It is, of course, equally applicable to ad valorem property taxes and sales taxes—the issue in each situation being whether the goods are in the "stream of exports" at the moment they are taxed. If the articles have not in tax day entered foreign commerce, even though they are destined for export, they are subject to state ad valorem property taxes. Coe v. Errol, *supra.* And this Court has held that this is so even though goods are being packed, or after having been packed, are awaiting the carrier. Empresa Siderugica S.A. v. County of Merced, *supra.*

ury v. *Wood Preserving Corp.*, 313 U.S. 62 (gross receipts tax on railroad ties delivered to but not immediately loaded on railroad cars); *Turpin* v. *Burgess*, 117 U.S. 504 (excise tax on tobacco exacted before removal for export); *State Tax Comm'n* v. *Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (sales tax on pipe; passage of title and delivery occurring in taxing state and actual placement on common carrier occurring at a later date); *International Harvester Co.* v. *Dept. of Treasury*, 322 U.S. 340, 345 ("immaterial to the present case that the goods are to be transported out of [the state] . . . immediately on delivery") (gross receipts tax on sale).

Kosydar v. *National Cash Register Co.*, 42 L. W. 4767, is the latest in this line of cases. National Cash Register built machines to foreign buyers' specifications. Pending shipment they were warehoused in Ohio with title, possession, and control remaining with the manufacturer. In holding that this property was not immune from an ad valorem tax, the Court relied explicitly on *Coe* v. *Errol*, concluding:

> It may be said that *insistence upon an actual movement* into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. [42 L.W. at 4770. (Emphasis added.)]

Lilly mandates that principles enunciated from 1886 (*Coe* v. *Errol*) to 1974 (*Kosydar*) be applied for purposes of qualification. A decision to this effect substantiates the common understanding of when qualification is required.

C. Dahnke-Walker and Secondary Authorities

While this Court has not been presented with a similar factual situation, major secondary authorities are in agreement that the business format employed by Allenberg subjects it to qualification. They are also in agreement that

Appellee's major case, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, is inapplicable.

Dahnke-Walker involved a sale of grain under a contract calling for delivery aboard a carrier for interstate shipment. As described: "[W]hat otherwise seemed an intrastate transaction was a part of interstate commerce." 257 U.S. at 292. The decision is consistently referred to and limited as involving a "unitary interstate transaction," *Eli Lilly & Co., supra*, at 292 (dissenting opinion); *Union Brokerage* v. *Jensen*, 322 U.S. 202, 211, and fits into the well established line of decisions flowing from *Coe* v. *Errol* making clear that once delivery to a common carrier occurs, interstate commerce (for purposes of immunity from *direct* exercises of state taxing powers) has begun. *E.g., Hughes Bros. Timber Co.* v. *Minnesota*, 272 U.S. 469, 475 ("solution is easy when the shipment has been delivered to a carrier . . . ."); *General Oil Co.* v. *Crain*, 209 U.S. 211, 228-9 ("the beginning . . . [of] interstate commerce is easy to mark . . . [as] the point in time an article is committed to a carrier . . . ."); *Diamond Match Co.* v. *Ontonagon*, 188 U.S. 82, 95 ("movement [in interstate commerce] . . . does not begin until the articles have been shipped . . . and [carrying them to the depot] is no part of that journey."); *A. G. Spaulding & Bros.* v. *Edwards*, 262 U.S. 66, 70 ("overt act of delivering the goods to the carrier marks the point of distinction . . . .").[23]

Prentice-Hall, in its corporate service manual section on qualification, notes *Superior Oil Co.* v. *Mississippi*, 280 U.S.

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[23] See also, Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166-67: "The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not . . . but whether here the State has delayed the incidence of the tax beyond the step where processing have ceased and transmission in interstate commerce has begun . . . ."

390, upholding a state tax on gasoline delivered to a wharf where it was *stored* prior to shipment to Louisiana. The commentary continues:

> But the mere fact that goods purchased in the state are transported beyond its boundaries may not be enough to constitute the transaction interstate commerce . . . . It is important to distinguish [*Superior Oil* from *Dahnke-Walker*] . . . for the two present points of similarity. In both cases the purchaser bought the goods in the state and they were delivered there, but in the oil company case delivery was made to the purchaser who *later* transported the oil out of the state, and in the Milling company case delivery was to a *common carrier* for transportation to the buyer's mill in another state. [1 PRENTICE-HALL, CORPORATIONS ¶ 7450, p. 7344. (Emphasis added.)]

Concluding its advice to foreign corporations as to *qualification* when making purchases in other states for delivery out of those states, the manual advises:

> ➡ WHAT TO DO ➡ *Delivery to carriers:* To avoid "doing business" liability [qualification] on purchases, make sure that goods are *delivered to carrier* for outstate shipment. *Pending sale:* If instate purchases are made with the expectation of resale, corporation, instead of taking immediate delivery within the state pending outstate sale could arrange for seller to hold goods until subsequent sale is made and then have direct shipment made to outstate purchasers. [1 PRENTICE-HALL, CORPORATIONS, ¶ 7450, p. 7346. (Emphasis added.)]

Fletcher, discusses qualification as a matter of black-letter law and distinguishes *Dahnke* on the following basis:

> The purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce, and the commerce includes the purchase quite as much as the transportation [citing *Dahnke*]. A mere purchase in the state, however, without a ship-

> ment outside the state, does not constitute interstate commerce . . . .[24] [17 W. FLETCHER, CYCLOPEDIA CORPORATIONS § 8415, pp. 374-5 (1960).]

The treatise foregoes an analysis of this Court's decisions with respect to taxing and relies on decisions involving qualification from lower courts.

D. Lower Court Decisions

In re Conecuh Pine Lumber & Mfg. Co., 180 Fed. 249, involves an attempt by an unlicensed foreign corporation to sue on a contract for the delivery of 3,000,000 feet of lumber. The lumber was intended for out-of-state shipment but delivery and title passed at a point described as "Elmore Station" in the state in which the corporation had failed to qualify (Alabama). Concluding that the transaction was intrastate in nature (thereby precluding utilization of the court to enforce the contract), the opinion utilizes an analysis directly applicable to the Allenberg situation:

> How can the fact . . . that the Lumber Company, when it entered into this contract, had the intention to sell the lumber so purchased here only to persons in other states, convert what was done at Elmore Station where the lumber was inspected, received and stored for future shipment, into a transaction in interstate commerce? [Citing *Coe* v. *Errol*] . . . . The lumber at that time had not started on an interstate journey . . . . Its destination, when the contract was made and acts done under it, was Elmore Station. When it was delivered, it was in compliance with the contract and the legal title and full ownership of the lumber vested and remained in the Lumber Company . . . .
>
> Having reached its destination, and been received in this state, and held there for subsequent resale, the lumber became intermingled with the general mass of property in Alabama, was under the protection of its

[24] Citing Sunlight Produce Co. v. State, 183 Ark. 64, 35 S.W. 2d 342, a state court decision involving storage of goods prior to interstate commerce. It is treated in the text, *infra*.

> laws, and subject to local taxation. Its situs and status are in no way changed because the Lumber Company, when it brought, had the intent to resell and ship the lumber to any one who might buy it for shipment out of the state. [180 Fed. at 251-2.]

In *Sunlight Produce Co.* v. *State*, 183 Ark. 64 35 S. W. 2d 342, the court held that a company purchasing poultry, eggs and cream through an agent in the state was required to secure a certificate of authority because the products bought were stored prior to placement on a carrier. *State* v. *Pioneer Creamery Co.*, 211 Mo. App. 116, 245 S. W. 2d 362, involved an agent for a foreign corporation purchasing cream, placing it in a storeroom and subsequently shipping it to the corporation in another state where it was turned into butter. Noting that the contracts of purchase called for intrastate delivery with a delay prior to interstate transit, the court rejected a contention that the business was interstate and therefore no certificate to do business was required. The opinion penetrates the practical consequences of Allenberg's argument:

> It would naturally follow that every kind of business transacted in this state for the purchase of material of any kind, which was afterwards shipped to another state . . . would or could be made interstate commerce. The business transacted by the defendant in this state was separate and distinct from interstate commerce and subject to the laws of this state governing foreign corporations. [211 Mo. App. at 117, 245 S. W. at 363.]

These cases reflect the state of the law in the lower courts prior to the intervening decision by Judge Orma Smith in *Cone Mills* v. *Hurdle*, 369 F. Supp. 426 (N.D. Miss.)

E. The Cone Mills Decision

Judge Smith holds that purchases by foreign corporations of cotton followed by subsequent storage pending

out-of-state shipment is interstate commerce. In conclusion:

> As in *Dahnke-Walker*, the contracts in these cases were negotiated and executed in the forum state, the commodity was to be delivered to the seller and paid for by the buyer in Mississippi, and the commodity involved was one of nationwide importance. [369 F. Supp. at 436.]

Delivery to a carrier is not constitutionally significant. Presumably, the more important the commodity, the more "interstate commerce" is to be inferred.

No issue with respect to Congress' power to regulate was in issue; the question of pre-emption was never posed. In what may be considered an alternate holding in the case, Judge Smith defines limitations on state power in the context of such cases as *Wickard* v. *Filburn*, 317 U.S. 111, *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, and Mr. Justice Holmes' conclusion in *Swift & Co.* v. *United States*, 196 U.S. 375, 398, that interstate commerce "is not a technical legal conception, but a practical one drawn from the course of business." 369 F. Supp. at 436. Appellee can only respectfully note that the "aggregate effects" test and Justice Holmes' reference to a "practical" conception of interstate commerce refers to congressional power under the commerce clause;[25] not exercises of state power.

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[25] Though no issue of pre-emption is raised in the questions presented, this approach is more fully developed by *Amicus* (who participated in *Cone Mills*) by extensive reference to irrelevant federal legislation, e.g., the Cotton Research & Promotion Act, and to the innumerable decisions by this Court springing from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, as well as those in the lower federal courts. *E.g.*, Bruhn's Freezer Meats v. Department of Agriculture, 438 F.2d 1332 (8th Cir.) (violations of the Packers and Stockyards Act). If a serious attempt is made to raise the issue of pre-emption reference is made to Union Brokerage Co. v. Jensen, 322 U.S. 202, where a business *directly regu-*

The most disturbing aspect of the decision is Judge Smith's reliance on language utilized by Mr. Justice Van Devanter in *Dahnke-Walker* and *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189. The latter case is a 1924 decision involving a detailed state regulatory scheme known as the North Dakota Grain Grading Act. Certain buyers of wheat argued that the Act was an invalid exercise of state power on two grounds: (1) it "burdened" interstate commerce; and (2) its provisions conflicted with the United States Grain Standards Act regulating the same industry. 268 U.S. at 191.

In holding the act unconstitutional Mr. Justice Van Devanter uses language which—if constitutionally sound—expands the definition of interstate commerce found in *Coe* v. *Errol*:

> *Buying for shipment*, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce, *the buying being as much a part of it as the shipping* . . . Stafford v. Wallace, 285 U.S. 495 . . . Binderup v. Pathe Exch., 263 U.S. 291 . . . .
>
> Wheat . . . is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, *but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution.* [268 U.S. at 198-99.]

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lated by Congress was denied the defense of pre-emption in the context of a state qualification statute. See also Federal Compress v. McLean, *supra*. The issue would be raised if Congress, pursuant to its powers under the commerce clause, passed a federal incorporation statute. See *Hearings Before a Subcommittee of the Committee on the Judiciary* on S. 10 and S. 3072, 75th Cong., 1st & 3d Sess. (1937-8); Robbins, *Federal Licensing of Business Corporations*, 13 TUL. L. REV. 214 (1939); Chaplin, *National Incorporation*, 5 COL. L. REV. 415 (1905).

With respect to this portion of the opinion certain comments are in order. First, the constitutional analysis employed (no regulation of interstate commerce) is no longer valid. See, *e.g., South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520. Second, the definition given to interstate commerce (buying for shipment) has only remained viable by this Court's limitation of the case to its facts. For instance, in *Parker* v. *Brown*, 317 U.S. 341, 361 (regulation of raisen marketing) the Court comments:

> There [in *Shaffer*] the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a part of interstate commerce. Compare Chassinol v. Greenwood, 291 U.S. 584

Distinguishing *Shaffer* from *Chassinol* (regulating cotton buying), is sufficient for the instant case. A serious question remains, however, as to whether *Shaffer* continues to deserve such tender treatment.

Discussion of the now defunct theory of "dual federalism" and the conflicting analyses utilized by the Court with respect to cases arising under the Commerce Clause prior to 1937 serves little purpose. See Stern, *The Commerce Clause & the National Economy*, 1933-46,[26] 59 HARV. L. REV. 645, 833 (1946); Compare *Kidd* v. *Pearson*, 128 U.S. 1 (manufacturing is not interstate commerce) *with United States* v. *E. C. Knight Co.*, 156 U.S. 1 and *Hammer* v. *Dagenhart*, 247 U.S. 251. What should be noted with speci-

[26] "In many of the cases . . . [prior to 1935] the technique by which the Court proceeded was to decide whether a subject was or was not interstate commerce; if it was, Congress alone could regulate it and, if not, only the state could." 59 HARV. L. REV. at 648.

fic respect to *Shaffer* are the cases relied upon to substantiate the proposition that "buying for shipment" constitutes interstate commerce. *Stafford* v. *Wallace* upheld the constitutionality of the Packers and Stockyards Act and *Binderup* v. *Pathe Exchange*, the Sherman Act as applied to certain motion-picture distributors. The *only* reasonable conclusion which can be drawn is that Justice Van Devanter, in defining "interstate commerce" for purposes of state power when Congress has legislated specifically on the subject, was—in today's sense—talking pre-emption. The latter part of the quotation speaking of a "common right . . . committed to Congress" reinforces this conclusion as does a comparison of the provisions of the United Grain Standards Act with applicable sections of the North Dakota Act. Finally, the latter part of the opinion rejecting the contention that North Dakota inspection regulations "assisted" the carrying out of the purposes of the United States Grain Standards Act, 268 U.S. at 202-03, fits well within this analysis. Compare *Campbell* v. *Hussey*, 368 U.S. 297, 302 ("complementary state regulation is as fatal as state regulations which conflict with the federal scheme") *with Florida Lime & Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132 (neither such actual conflict between the two schemes of regulation that both could stand in the same area, nor evidence of congressional design to pre-empt the field); See also Note, *Pre-Emption As a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 310 (1959). The decision is—by today's standards—correct. The unfortunate language found in the opinion, however, cannot remain untouched.

Somewhat different issues are raised by Mr. Justice Van Devanter's opinion in *Dahnke*. As a threshold proposition

> [t]he commerce clause of the Constitution . . . expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. [257 U.S. at 290]

The opinion then continues into that portion relied upon by Judge Smith and opposing counsel:

> "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, sale, and exchange of commodities." In Kidd v. Pearson . . . it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In United States v. E. C. Knight Co. . . . "contracts to buy, sell, or exchange goods to be transported among the several states" were declared "part of interstate trade or commerce." And in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 . . . the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property . . . but also the purchase, sale and exchange of commodities." *In no case has the court made the distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state.* [257 U.S. at 291].

Dahnke was not decided in a context of federal legislation directly bearing on a transaction said to be subject to the regulatory power of the state (interstate sale of wheat). Thus, the constitutional analysis employed can only be understood in the context of the threshhold concept, *i.e.*, the commerce clause, *by its own power*, prohibits state regulation of those activities deemed "interstate commerce." Finding language in *Knight* and *Addyston* (interpretations of the Sherman Act) defining "interstate commerce" in the sense of constitutionally exercisable powers of Congress (regulating, buying, selling, etc.),[27] the fact that it (the power of Congress) had not been exercised was not significant since the *existence* of that power was understood

[27] As in *Kidd* where "manufacturing" was distinguished for purposes of state regulation.

to prohibit any regulation by the states. As previously noted, this constitutional proposition has long since been discarded by the Court. Again, as in *Shaffer*, the result reached in the case (delivery on board carrier is "interstate commerce") is correct. It is the analysis which is tainted.

III. TAXING CASES AND QUALIFICATION

Lilly, in utilizing taxing cases as the constitutional model for qualification, poses analytical difficulties by failing to explain why such cases are appropriate.[28] The interrelation between qualification and the exercise of state taxing powers is recognized, however, as a fulcrum point for an improved utilization of the latter[29] by many commentaries on the subject:

> [C]orporate offenders, both the crafty and the inadvertant, may remain undetected indefinitely—the de-

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[28] Leading to at least one plausable explanation: the facts in *Lilly* more closely paralleled taxing cases than other areas relating to exercises of state power. This facit of the opinion is a basis for criticism the case has received. See Note, *Corporate Registration: A Functional Analysis of Doing Business*, 71 YALE L. J. 575, 590-91 (1962); Comment, *The Lilly Case: Dictum, Holding & Finding*, 57 N.W.U.L. REV. 306 (1962); 75 HARV. L. REV. 138, 140 (1962) ("line drawn by *Lilly* is not entirely clear"); Note, *Foreign Corporations—Promotional Activities May Subject Foreign Corporation to State Qualification Statute*, 15 VAND. L. REV. 650, 653 (1962) ("It would seem that the mechanical 'doing business' test which the Court continues to apply in such cases is destined to compound rather than clarify the confusion which now exists."). These and other commentaries, however, see *Lilly* as an acceptable "increase" of state power over foreign corporations. Note, 47 CORN. L. Q. 300, 308 (1962); Comment, *Corporations—What Constitutes "Doing Business" to Require a Foreign Corporation to Obtain a Certificate of Authority in Order to be Able to Maintain a Suit Within the State*, 8 N.Y.L. FORUM 293, 298 (1963); Note, 19 ALA. L. REV. 193 (1962).

[29] The drive to more fully integrate qualification statutes with state taxing laws is demonstrated by a significant number of states which utilize the secretary of state's office (or its equiva-

sired information and unobtained revenue lost [when qualification is not effectuated.] [Note, *The Legal Consequences of Failure to Comply with Domestication Statutes,* 110 U. PA. L. REV. 241, 267-8 (1961).]

The requirements thus established [for qualification] are designed to [among other things] eliminate tax evasion. [Note, *Sanctions for Failure to Comply With Corporate Qualification Statutes: An Evaluation,* 63 COLUM. L. REV. 117 (1963)].

State benefits sought are more adequate protection of citizens and enforcement of applicable state laws on the basis of information filed. . . . The availability of information to state citizens and tax assessors is a legitimate state interest . . . . [Comment, *The Lilly Case: Dictum, Holding, & Finding,* 57 N.W.U.L.REV. 306, 321-22 (1962)].

The state's interest in registration lies in the receipt of taxes . . . . [Comment, *Foreign Corporations—State Boundaries for National Business,* 59 YALE L. J. 736, 746 (1950)].

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lent) as an adjunct to the taxing division of state government. *Fixed fee imposed as a tax:* COLO. REV. STAT. ANN. § 31-10-7 (1964); CONN. GEN. STAT. ANN. § 33-405 (1960); OREGON REV. STAT. § 57.769 (1971). *Authorized capital stock taxes: e.g.,* IDAHO CODE § 30-506 (1967); ME. REV. STAT. ANN. tit. 13-A, § 1413 (Supp. 1973); NEB. REV. STAT. § 33-101 (Cum. Supp. 1965); N.C. GEN. STAT. § 55-156 (Supp. 1973); *Capital within the state:* ILL. STAT. ANN ch. 32 § 157.135-157.140 (Smith-Hurd. 1954); IOWA CODE ANN. § 494.13 (1949); WASH. REV. CODE 23A 40.140 (1969). *Minimum fixed fee plus an additional pro rata gross receipts tax:* MONT. REV. CODE ANN. § 15-22-124 (1967); N.D. CENT. CODE § 10-23-07 (1960). *Liability for taxes due the state:* OKLA. STAT. ANN. tit. 18, § 1.201 (1953); OHIO REV. CODE ANN. § 1703.29 (Page 1964); S. C. CODE ANN. § 12-23.15 (Supp. 1974).

One state exceeds the constitutional limits set forth in *Lilly* (no qualification for soliciting "purely" interstate sales) by requiring qualification for those businesses subject to use taxes. See FLA. STAT. ANN. § 212.06 (g) (1971), described more fully in section V, *infra.*

Many requirements for qualification found in the Mississippi Code relate to providing information, *e.g.*, listing authorized stock, names of directors, etc.[30] Foreign corporations, however, must also file:

> An estimate, expressed in dollars, of the value of all property to be owned by the corporation for the following year, wherever located, *and an estimate of the value of the property of the corporation to be located within the state during such year,* and an estimate expressed in dollars, of the gross amount of business which will be transacted by the corporation during such year, *and an estimate of the gross amount thereof which will be transacted by the corporation at or from places of business in this state during such year.* [MISS. CODE ANN. § 79-3-219(k) (1972) (Emphasis added).]

The link to one portion of the Mississippi Code on taxation is direct:

> There is hereby imposed . . . upon every corporation . . . *organized and existing under and by virtue of the laws of some other state* . . . a franchise or excise tax equal to two dollars and fifty cents on each one thousand dollars or fraction thereof *of the value of capital used, invested or employed within the state* . . . It is the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state. [MISS. CODE ANN. § 27-13-7 (1972). (Emphasis added.)] [31]

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[30] See MISS. CODE ANN. § 79-3-219 (1972), relating to perfunctory requirements as to information required.

[31] *Amicus* refers to one statute exempting cotton from taxation in the possession of *producers*. *Brief for Amicus* at 80. Allenberg, of course, is not a producer. The relevancy of Allenberg's tax liability to the state is not in issue; what is important is the fact that many aspects of its business *are* constitutionally susceptable to the state's taxing power.

Judge Smith, in *Cone Mills,* characterized Mississippi as a "cotton producing state." 369 F. Supp. at 436. This portion of his opinion *is* correct and again brings into play *Coe* v. *Errol* and the real economic issues raised here and by that case:

> It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. *If such were the rule in many States there would be nothing but the lands and the real estate to bear the taxes.* Some of the Western States produce very little except wheat and corn, most of which is intended for export; *and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State.* [116 U.S. at 327-28. (Emphasis added.)]

Mississippi's economic interest in cotton is obvious. The instant case merits an opinion enunciating as a matter of constitutional principle that a state's power to require qualification is properly exercised when the activities of a foreign corporation are taxable. If such a decision is forthcoming, Mississippi will possess additional leverage to receive from companies such as Allenberg the quid pro quo of all tax revenue which can be constitutionally generated prior to the time this major resource enters the stream of commerce.

IV. QUALIFICATION AS AN EXERTION OF REGULATORY POWER

Judge Smith's opinion in *Cone Mills* (and opposing counsel here) alludes to an exercise of the state's regulatory power in the context of Mississippi's qualification requirements. An initial review of the present status of qualification in the United States places the Mississippi requirements in an appropriate light for review as a regulatory measure.

A. Foreign Corporations and State Qualification Statutes

Bank of Augusta v. *Earle,* 38 U.S. (13 Pet.) 519, and its progeny placed a residuum of power within the states to control and regulate foreign corporations.[32] Initial hostility directed by the states against all outsiders[33] has long since dissipated. Possibly for the same political and economic reasons relating to the abandonment of

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[32] The traditional theoretical basis for permitting states to regulate the commercial affairs of a foreign corporation carrying on business within their borders is derived from decisions holding that, as the corporation has legal existence only in the state of its incorporation, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, and is not a citizen within the meaning of the privileges and immunities clause, *e.g.*, Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 178, a state may exclude foreign corporations from engaging in local (intrastate) business. Railway Express Agency v. Virginia, 282 U.S. 440. Thus, subject to restrictions on imposing unconstitutional conditions for entry, Terrel v. Burke Const. Co., 257 U.S. 529 (waiving recourse to sue in federal court) and extension of exclusionary and/or licensing statutes to foreign corporations engaged exclusively in interstate commerce, Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 12; Dahnke-Walker Milling Co. v. Bondurant, 267 U.S. 282, a state may choose to admit corporations on whatever conditions it may deem appropriate.

[33] "[T]here is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that the advantages thus possessed, the most important businesses of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181-2. See also, Isaacs, *An Analysis of Doing Business,* 25 COLUM. L. REV. 1018 (1925).

strong regulatory exercises by many domicilliary states,[34] entrance into the marketplaces of a majority of states is —for all intents and purposes—unrestricted and not laden with any barriers designed to curtail the economic growth that necessarily accompanies increased business activity.[35]

The thirty-four states adopting the Model Business Act[36] fit well within this analysis. The Act, while described as expressly not designed to attract local incorporation business,[37] provides that nothing therein shall be construed to "regulate the organization or internal affairs of foreign corporations." 2 ABA-ALI MODEL BUS. CORP. ACT. ANN. § 106 (1971), as adopted, MISS. CODE ANN. § 79-3-211 (1972). The only major restriction placed on qualifying corporations is the prohibition against exercising powers in excess of those granted domestic corporations. MISS. CODE ANN § 29-3-213 (1972). This complete absence of regulatory provisions leads some authorities to conclude

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[34] For a recent commentary detailing the "Delaware experience" and the development of "enabling acts" for purposes of incorporation, see Kaplan, *Foreign Corporations & Local Corporate Policy*, 21 VAND. L. REV. 433 (1968). See also Note, *Foreign Corporations—State Boundaries For National Business*, 59 YALE L. J. 737 (1950).

[35] A prime example of the exception is New York. Provisions of the New York Business Corporation Law exert *detailed* regulatory powers over the "internal affairs" of foreign corporations. See N.Y. BUS. CORP. LAW §§ 1315-19 (1963); Note, *Corporations: Domestic Regulation of Foreign Corporations: Concept of "Domiciled Foreign Corporations:" New York Business Corporation Law of 1961*, 47 CORN. L.Q. 273 (1961).

[36] A total of twelve states have provisions identical to the Act. Twenty-two are "substantially similar." 2 MODEL BUSINESS CORPORATION ACT ¶ 3.0,-.02 (1971) (Supp. 1973).

[37] *See* Garrett, *Preface to 1950 Revision, Model Business Corporation Act*, HANDBOOK A. COMMITTEE ON CONTINUING LEGAL EDUCATION, AMERICAN LAW INSTITUTE, iv-x. *But see* Harris, *The Model Business Corporation Act; Invitation to Irresponsibility?*, 50 N.W.U.L. REV. 1 (1955)

that it encourages incorporation *outside* Model Act jurisdictions to *avoid regulation* by those states. HENN, CORPORATIONS & OTHER BUSINESS ENTERPRISES § 99 (1961); Note, *Corporations: Domestic Regulation of Foreign Corporations: Concept of "Domiciled Foreign Corporation:" New York Business Corporation Law of 1961,* 47 CORN. L.Q. 273, 274 n. 3 (1961).

B. Requirements Imposed by Mississippi

The typical analysis of qualification excludes regulation, *e.g.,* "qualification generally involves [1] the payment of a fee, [2] the submission of data . . . and [3] the appointment of a resident agent . . . ." Note, *Sanctions for Failure to Comply With Corporate Qualification Statutes: An Evaluation,* 63 COLUM. L. REV. 117 (1963). Similarly, the *major* requirements of the Mississippi Code relating to qualification require the *giving of information* [38] concerning corporate existence, powers and business to be done in the state. These include corporate name, [39] date of incorporation, [40] addresses of principal and registered office in the state (and agent therein), [41] purposes of the business, [42]

[38] This is in accord with the comments from the Model Business Act, concluding that it is designed: "(1) to place foreign corporations under the supervision of the state and protect its citizens in their transactions with such corporations; (2) to subject them to inspection so that conditions, standing and solvency may be known; (3) to put them in a state of equality with domestic corporations with respect to information required to be furnished; (4) to facilitate their subject to jurisdiction of the state's courts; and (5) to provide readily accessible evidence of the foreign corporation's existence." MODEL BUSINESS CORPORATION ACT ANN. § 112 ¶ 2 (1971).

[39] MISS. CODE ANN. § 79-3-219 (a) (b) (1972). See also MISS. CODE ANN. § 79-3-215(c) (power to reject if similar to domestic corporation).

[40] MISS. CODE ANN. § 79-3-219 (c) (1972).

[41] MISS. CODE ANN. § 79-3-219 (d) (e) (1972).

[42] MISS. CODE ANN. § 79-3-219 (f) (1972).

names of directors and officers,[43] number of shares authorized and issued,[44] corporate capital,[45] and, as previously noted, the estimated value of business to be done and capital committed in the state.[46] After payment of a filing fee ranging from $25 to $500 (similarly applicable to domestic corporations and scaled to the size of the corporation),[47] the Code mandates that the secretary of state "*shall*" issue the requested certificate. MISS. CODE ANN. § 79-3-221 (1972).[48]

Subsequent to issuance of the certificate, annual and supplemental filings of similar information are required[49] The *sole statutory ground* for revocation of a certificate (other than failure to pay fees or appoint an agent for service) relates to noncompliance with these informational provisions.[50] In order to insure that correct information

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[43] MISS. CODE ANN. § 79-3-219 (g) (1972).

[44] MISS. CODE ANN. § 79-3-219 (h) (i) (1972).

[45] MISS. CODE ANN. § 79-3-219 (j) (1972).

[46] MISS. CODE ANN. § 79-3-219 (k) (1972).

[47] MISS. CODE ANN. § 79-3-255 (1972). Fees are based on capital stock, the charge of $25 beginning for corporations having $5,000 and under and $2 for each additional $1,000 with a maximum of $500 prescribed. *Ibid.*

[48] A general appeal provision exists to protect against the arbitrary failure of the secretary to comply with these mandatory provisions. See MISS. CODE ANN. § 79-3-273 (1972).

[49] MISS. CODE ANN. §§ 79-3-249-50 (1972) (annual reports); 231 (amendments to articles of incorporation); 233 (information as to mergers); 235 (changes of name or purposes); 227 (change in registered office or agent).

[50] "The certificate of authority of a foreign corporation to transact business in this state may be revoked by the secretary of state . . . when:

(a) The corporation has failed to file its annual report . . .

(c) The corporation has failed, after change of its registered

has been given by qualified corporations the secretary also possesses the power to issue interrogatories to enable him to ascertain compliance. MISS. CODE ANN. § 79-3-265-267 (1972).[51]

With respect to the withdrawal process, the secretary of state is under statutory mandate to secure the following information:

> Such additional *information* as may be necessary or appropriate in order to enable [him] . . . to determine and assess any unpaid fees payable by such foreign corporation . . . *and a certificate from the state tax commission that the foreign corporation owes no sales taxes.* [MISS. CODE ANN. § 79-3-237 (i) (Emphasis added.)]

Finally, the informational thrust of qualification is reflected by penalties for doing business in the state without first securing a certificate of authority. After directing that no action may be brought by such corporations in state courts, the Code imposes penalties including the amount of fees due from the corporation if it had qualified at the appropriate time "and thereafter filed all *reports* required by this chapter." MISS. CODE ANN. § 79-3-247 (1972) (Emphasis added.)

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office or registered agent, to file in the office of the secretary of state a statement of such change . . .

(d) The corporation has failed to file . . . any amendment to its articles of incorporation or any articles of merger . . .

(e) A misrepresentation has been made as to any material matter . . . ." MISS. CODE ANN. § 79-3-241 (1972).

[51] Statutory authorization is also given for the inspection of books when the secretary of state and the attorney general "both believe upon probable cause" that a corporation "is or has engaged in any illegal stock manipulation, scheme or artifice to defraud . . . ." MISS. CODE ANN. § 79-3-271. This information, of course, relates to enforcement of the state's Securities laws. See Mississippi v. Dare to be Great, Inc. (Cir. Ct. Hinds County 1974) (unreported opinion).

C. State Regulation & Union Brokerage v. Jensen

For purposes of determining intrastate commerce in the context of an exertion of regulatory powers the same "mechanical test" alluded to in *Kosydar* is applicable. As described in *Parker* v. *Brown,* 317 U.S. 341, 360-61:

> In applying the mechanical test to determine when interstate commerce begins and ends (see *Federal Compress* v. *McLean* . . . .) this Court has frequently held that for purposes of local *taxation* and *regulation* "manufacture" is not interstate commerce even though the manufacturing process is of slight extent. *Crescent Oil Co.* v. *Mississippi,* 257 U.S. 129 [upholding statute prohibiting certain corporations from operating cotton gins] . . . . And such regulation of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. *Kidd* v. *Pearson,* 128 U.S. 1 . . . . *And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.* (Emphasis added.)

The power to "license" (now in the regulatory sense) is affirmed. Allenberg, as a foreign corporation having sole ownership and control over cotton prior to its insertion into interstate commerce (a common mass of property in the state) can therefore be subjected to plenary regulatory power, *albeit* not to the extent of forcing the company to construct facilities to compress and store the raw material (absent a showing of a valid local concern). *Pike* v. *Bruce Church,* 397 U.S. 137. Cases involving *direct* exercises of regulatory power are, however, inapplicable. Any analysis of state qualification statutes in a regulatory context begins and ends with the case preceding *Eli Lilly: Union Brokerage Co.* v. *Jensen,* 322 U.S. 202.

Suit was brought by the company for breach of fiduciary relations. The defense was failure to qualify under pro-

visions similar to those found in the Mississippi Code. As described:

> The [Minnesota Act] . . . requires a certificate of any foreign corporation doing business in the State as a prerequisite for maintaining an action in a court of that State. In addition to a filing of five dollars an initial license fee of fifty dollars is exacted on making application for a certificate of authority . . . . Such an application must contain the name of the corporation, its home state or country, the address of its principal office and that of its proposed registered office in Minnesota, the names and addresses of its directors and officers, a statement of its aggregate number of authorized shares and kindred information . . . . The applicant must furthermore consent to the service of process upon it and appoint an agent upon whom service can be made . . . A foreign corporation doing business in Minnesota without a certificate of authority is subject to a penalty not exceeding $1,000 and "an additional penalty not exceeding $100 for each month or fraction thereof during which it shall continue to transact business in this state without a certificate of authority." . . . Having obtained such a certificate, the corporation is required to file annual reports on the basis of which an annual fee is assessed. The measure of the fee is substantially the same as that set for domestic corporations but in its computation the property and gross receipts of a foreign corporation are allocated between those derived from within and those derived from without Minnesota. . . . [322 U.S. at 206-07.]

In sustaining these provisions as applied to Union Brokerage, Mr. Justice Frankfurter wrote for a unanimous Court. The holding is specific: Although the primary business of the company was solely foreign commerce (facilitating imports and exports) incidental activities of purchasing materials and services from people in the state sufficiently "localized" the business for qualification purposes. To this extent *Lilly* and *Union Brokerage* are compatible, *i.e.*, while Lilly's entire business was obviously

not "localized" in New Jersey, its activity within the state —which included promoting and occasionally participating in intrastate sales—can be characterized within the *Union Brokerage* framework as "localized" interstate commerce.[52]

Mr. Justice Frankfurter, however, eschews any reliance on taxing cases, 322 U.S. at 207, and proceeds to analyze qualification as a constitutional exercise of regulator power. He initially notes:

> The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State. [322 U.S. at 210.]

Continuing,

> The business of Union, we have seen, is localized in Minnesota, and Minnesota in the requirement before us, merely seeks to regularize its conduct . . . . In the absence of applicable federal regulation, a State may impose nondiscriminatory regulations on those engaged in foreign commerce "for the purpose of insuring the public safety and convenience; . . . . a license fee no larger than is reasonably required to defray the expense of administering the regulations may be demanded." . . . The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce . . . . [Indeed that Clause does not] preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders *when the legislation by which this is accomplished is*

[52] *Lilly* and *Union Brokerage*, as the instant case, also involved causes of action "separable" from interstate and foreign commerce.

general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. [322 U.S. at 211, 212. (Emphasis added.)]

D. Union Brokerage and the Applicability of the Mississippi Business Code to Allenberg

The requirements imposed by Mr. Justice Frankfurter with respect to "localized" business are again met by Allenberg: (1) employing agents on a commission basis in the state; (2) contracts with Mississippi farmers for sale and delivery of cotton to points within the state; and (3) further contracts with businesses such as the Federal Compress and Warehouse in Marks for storage and delivery of its cotton to common carriers for interstate shipment.[53] A sufficient nexus (in the terminology of Justice Frankfurter) exists for the application of a regulatory scheme "general in its scope . . . not aimed at interstate or foreign commerce [and involving] . . . merely burdens incident to effective administration."

There are no significant differences between the Mississippi Code and those provisions at issue in *Union Brokerage*. The Code mandates qualification to be a nondiscretionary function of the secretary of state. Qualification fees, following the suggestion of the Model Business Act[54] are cumulatively lower,[55] nondiscriminatory and reasonably adapted "to defray the expense of" administra-

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[53] "The actual picking out of the bales of cotton, tagging and marking them for shipment, loading the bales into cars and taking out the bill of lading are functions performed by the warehouseman *at the direction of the cotton merchant.*" Appellant, *Brief on the Merits* 12. (Emphasis added.)

[54] MODEL BUSINESS CORP. ACT ANN. § 112 (1972).

[55] The Minnesota Act incorporated, "annual fee" requirements. This type of provision is not found in the Mississippi Code.

tion. 322 U.S. at 211. As such, the Code meets all the criteria of a regulatory scheme limited solely to the gathering of information, to-wit:

> However, a [normal] qualification statute . . . is neither a revenue measure nor a means to exclude foreign business. *Where authorization is automatic* upon application, and qualification does not extend privilege tax liability, *the qualification statute becomes in reality a regulatory measure, the purpose of which is to provide information* . . . . [Comment, *The Lilly Case: Dictum, Holding, & Finding*, 57 N.W. U.L. REV. 306, 321 (1962) (Emphasis added.)]

Not raised in the courts below nor posed as a "question presented" are arguments by Appellant and *Amicus* revealing yet another conflict with the qualification process: incurring "undue burdens." This, in turn, is coupled with a parallel argument that *International Shoe* and its offspring make requirements for appointment of agents for service of process illogical.[56]

The *Harvard Law Review*, reflecting on *Lilly* and state qualification requirements in general, concludes that they do have "some "*informational* value to the state, and such little effort is normally required to comply with these statutes, that even their cumulative effect is not overly burdensome." 75 HARV. L. REV. 138, 140 (1962) (Emphasis

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[56] Reliance is also placed on Judge Smith's conclusion in *Cone Mills* that the primary purpose behind qualification is the requirement of appointment of an agent for service of process. 369 F.Supp. at 431. This, again is incorrect. The Mississippi Supreme Court concludes with respect to qualification: "[I]f a foreign corporation engages in business in this state, it must bear its share of responsibilities as a corporate citizen the same as a domestic corporation." Trane Co. v. Taylor, 295 S.2d, 746, 750. See also note 38 *supra*, detailing the purposes of the Model Business Act.

added.) The Note also turns to the issue of agents for service of process:

> Even though a state may now, on the basis of "minimum contacts" assert jurisdiction without the corporation's actual consent, the requirement of an agent eliminates both the uncertainty of that standard and the possibility of litigation to determine whether the standard has been satisfied. [*Id.* at 140.]

A plain reading of the Mississippi Code indicates that its provisions meet those contemplated by Mr. Justice Frankfurter in *Union Brokerage.* Regulation, in the classic sense, is not involved. Rather, the detailed and intensive effort put into the Model Business Act insures that the "burdens incurred" are finely attuned to the informational interests of the state and purely incident to effective administration; *albeit* interpreted by some as providing the incentive for corporations to leave such states and re-enter as "foreign" corporations to avoid *regulation* as domestic entities. If considered an exercise of power in excess of that found in *Union Brokerage,* the distinct intrastate nature of Allenberg's activities mandate that the degree of "control" exercise does not exceed constitutional limits. *Porter* v. *Brown, supra.*

V. QUALIFICATION AND INTERSTATE COMMERCE

Crutcher v. *Kentucky,* 141 U.S. 47, established the basic proposition that qualification is to be assimilated with state licensing requirements and therefore any application to purely interstate commerce is an unconstitutional exercise of state power. The case arose in a time frame of state protectionist activity,[57] and in a factual context suitable for the period: criminal proceedings brought against an agent of an unlicensed express company under a qualification statute requiring, among other things, certification of working capital in excess of $150,000. Subsequent decisions (reaffirmed by *Lilly*) demonstrate that the Court considers all qualification statutes, regardless of differing bur-

[57] See section IV, note 33 and accompanying text.

dens imposed, as identical *vis-a-vis* their application to businesses engaged in interstate commerce.[58] Compare *International Textbook* v. *Peterson,* 218 U.S. 664 (minimal requirements of filing articles of incorporation; $25 filing fee; appointment of resident agent) *with International Textbook* v. *Pigg,* 217 U.S. 91 (extensive requirements including listing of all shareholders coupled with discretionary power to issue certificate); RESTATEMENT, CONFLICT OF LAWS § 175 (1934); 17 FLETCHER, CYCLOPEDIA CORPORATIONS § 8448, p. 504 (1960).

The lower court opinion in *Lilly* initially reviewed decisions expanding state regulatory and taxing powers into the arena of interstate commerce. *E.g., Southern Pac.* v. *Arizona,* 325 U.S. 761; *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450. After accepting the company's contention that purely "interstate commerce" was involved, the court utilized these cases to reject the argument that it was immune from qualification.[59] This Court by finding "localized" business activities affirmed on different grounds,[60] with Mr. Justice Harlan noting that

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[58] Cases arising in this area defining the exception have usually dealt with enforcement of contracts made in interstate commerce. International Textbook v. Pigg, 217 U.S. 9; Sioux Remedy v. Cope, 235 U.S. 197; Dahnke-Walker Milling Co. v. Bondurant, *supra;* Furst v. Brewster, 282 U.S. 493; International Textbook v. Peterson, 218 U.S. 664. The only exception is Buck Stove v. Vickers, 226 U.S. 205, dealing with suit brought by a company engaged in interstate commerce to set aside a fraudulent conveyance.

[59] The court queried: "If the levying of an income tax on the business of a foreign corporation which is generated within the state is not a burden on interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden on interstate commerce." 57 N.J. Super. 291, 304, 154 A.2d 650, 657.

[60] But not without leaving some confusion in its wake. Previously, in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, the same activities at issue in *Lilly* had been found to constitute interstate commerce. The petition for rehearing relying on this point was denied.

the case was an inappropriate vehicle for a determination of whether "wholly interstate business" may be required to qualify. 366 U.S. at 284 n.1.

The instant case falls within the *Lilly* framework, *i.e.*, the factual setting presented by Allenberg fails to raise the issue of qualification as applied to interstate business. Strenuous arguments by Appellant and *Amicus*, however, do focus on the issue and therefore some short comment is in order. Hopefully, this commentary can assist to place the instant decision in an appropriate context of current arguments on the subject and raise an awareness of steps taken by other states to expand their powers with respect to qualification.

A substantial body of secondary authority concludes that the "interstate commerce exception" has outlived its usefulness.[61] The primary authority for such conclusions is dictum found in Mr. Justice Frankfurter's opinion in *Union Brokerage*. The decision quotes the trial court's finding in the case with approval:

> [T]he customhouse broker in clearing shipments "aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States." [322 U.S. at 209.]

In this context, the conclusion:

> But the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate

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[61] 17 W. FLETCHER, CYCLOPEDIA CORPORATIONS § 6422, p. 387 (1960); G. HORNSTEIN, CORPORATION LAW & PRACTICE 53 (1959). See generally Note, *State Regulation of Foreign Corporations: Qualification; Interstate v. Intrastate Business: Eli Lilly & Co. v Sav-On-Drugs, Inc.*, 47 CORN. L.Q. 300, 301-02 (1962). The latter article notes that Hawaii, apparently anticipating a change in the law, enacted a statute providing that a foreign corporation transacting solely interstate and foreign business could nevertheless be forced to qualify. HAWAII REV. LAWS § 174-2 (1955). This section was repealed and presently the statute is in accord with the general rule. HAWAII REV. STAT. § 418-7 (9) (1968).

commerce. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 . . . [322 U.S. at 209-10.]

This portion of the opinion has given birth to varying constitutional theories to inter the commerce clause exception.

A. Restatement of Conflicts

The second *Restatement of Conflicts,* adopts a "balancing" approach somewhat similar to that utilized for review of cases involving the exercise of taxing, service of process, and regulatory powers.[62] Specifically:

> *Corporations engaged solely in interstate or foreign commerce.* The fact that a corporation is engaged solely in interstate or foreign commerce does not prevent a State in which the corporation does business from subjecting it to some measure of control . . . .
>
> A State's power to require such a corporation to satisfy local qualification requirements depends both upon the character of these requirements and upon the quantum of the corporation's activity within the State. Nor can they be imposed as the price of permitting the corporation to engage in one or more isolated acts of interstate or foreign commerce within the State. When, however, the corporation does . . . a substantial portion of its business within the State it can be subjected to appropriate penalties such as inability to sue

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[62] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 460-2 ["interstate commerce is not immune] from carrying its fair share of costs of government . . . ."); Braniff Airways v. Nebraska, 347 U.S. 590, 601 ("Nebraska certainly affords protection during such [interstate airplane] stops and these regular landings are clearly a benefit to [the corporation] . . . ."); International Shoe Co. v. Washington, 326 U.S. 310, 319: "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of [state] laws . . . [These activities] may give rise to obligations, and so far as those obligations arise out of . . . the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, be hardly said to be undue."

in local courts, for its failure to comply with reasonable qualification requirements. [RESTATEMENT, SECOND, CONFLICT OF LAWS § 311, pp. 337-8 (1971).]

From the perspective of the benefit/burden dichotomy, the reasonableness of Mississippi's registration requirements have previously been described. Quite obviously, Allenberg meets the "quantum" of business activity test. In addition, the following benefits are and have been received by this company from the state:

(1) Access has been given to trade in the state's major agricultural commodity;

(2) Utilization of facilities throughout the state for compressing and classification of cotton;

(3) Utilization of these same facilities for warehousing pending shipment; and

(4) Protection afforded to cotton (while warehoused in Allenberg's name) by city and county police and fire departments.

The importance of these "benefits" to businesses such as Allenberg's cannot be underestimated. As they relate to a viable business structure and the profit incentive, they are critical to its present capability to carry on a business for profit. Quite obviously, that asked in return (qualification) is reasonable under the circumstances.

The Restatement's requirement of a certain "quantum" of corporate business in a state prior to the imposition of qualification requirements on interstate business—if adopted by the Court—could possibly assist to obviate the current inexplicable conflict presented by *Scripto, Inc.* v. *Carson*, 326 U.S. 207. *Lilly* draws the qualification line at the point of pure solicitation: *Robbins*. In *Scripto*, the Court utilized due process concepts (minimal contacts) and approved the utilization of a use tax in the "drummer" situation. Noted at the outset of the opinion were Florida's

statutory provisions designed to insure collection of the tax, 362 U.S. at 207 n.1:

> "Dealer" also means and includes every person who solicits business either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogs or other advertising matter or by any other means whatsoever and by reason thereof receives orders for tangible personal property from consumers, for use, consumption, distribution, and storage for use or consumption in the state . . . [FLA. STAT. ANN. § 212.06(g) (1971).]

Foreign "dealers", in addition to being required to appoint an agent for service of process, FLA. STAT. ANN. § 212.151 (1971), must also file a

> certificate of registration for each place of business, showing the names of interested persons in such business, their residence, the address of the business, and such other data as the department may reasonably require. The application shall be made to the department before the person, firm, copartnership, or corporation may engage in such business, and it shall be accompanied by a registration fee . . . [FLA. STAT. ANN. § 212.18(3) (1971).]

Failure to register brings into play the no-access penalty, to-wit:

> [A]nd no action either in law or equity on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with. [FLA. STAT. ANN. § 212.06 (g) (1971).]

Lilly places Florida's ability to collect the use tax in jeopardy. If a change in the law is to occur the basic premise of the case; qualification is licensing which in turn implicitly assumes that interstate commerce cannot be carried on prior to qualification, must be rejected.

Ample authority exists for the proposition that a fee covering the administration of registration and supervision is not a tax. *Sprout* v. *City of South Bend*, 277 U.S. 163, 169. With respect to a direct prohibition against the carrying on of commerce: failure to qualify does not affect the validity of contracts entered into by a foreign corporation.[63] Rather, the state implicitly extends an invitation for foreign corporations to do all the business they desire without qualifying and it is only; (1) at the point where a contract is breached; and (2) no other alternative exists for enforcement except utilization of the state's court system, that a penalty comes into play. Compare *Spector Motor Co.* v. *O'Connor*, 340 U.S. 602, *with Northwestern States Portland Cement, supra* at 462 (tax left to be collected by ordinary means). Presuming the occurrence of these interlocked events the corporation—if it desires—may still continue to do business without qualifying. Thus, only as a *secondary matter* is interstate commerce affected (presuming an interstate contract is sought to be enforced). Justice Holmes, in a long forgotten dictum in *Diamond Glue Co.* v. *United States Glue Co.*, 187 U.S. 611, 615, (intrastate contract, failure to qualify), pointed to this unique characteristic of qualification when he viewed the procedure as only a "conditional" rather than a direct or "absolute" prohibition. And so it should be viewed today.

B. Other Constitutional Grounds for Upholding Qualification for Interstate Businesses

Mr. Justice Harlan's concurrence in *Lilly* noted the similarities between qualification and decisions approving state regulatory statutes modeled to exercises of the police power directed at specific types of interstate businesses.

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[63] "The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit, or proceeding in any court of this state." MISS. CODE ANN. § 79-3-247 (1972).

California v. *Thompson*, 313 U.S. 109 (licensing transportation agents). See also *Robertson* v. *California*, 328 U.S. 440 (licensing sales of insurance in interstate commerce); *People* v. *Fairfax Family Fund, Inc.*, 235 C.A. 2d 881, 47 Cal. Reprt. 812, *appeal dismissed*, 382 U.S. 1 (regulating loans by mail). This analysis is possibly best applied to exertions of regulatory power over certain classifications of foreign corporations. See N.Y. Bus. Corp. Law § 1320 (1963) (more than 50 percent income derived from New York).[64] A more significant parallel to the approach utilized in *Union Brokerage* is found in *Fry Roofing Co.* v. *Wood*, 344 U.S. 57, sustaining a registration requirement for all contract carriers (as with all business for qualification). Justice Black, writing for the majority, found "no discretionary right to refuse to grant a permit" where the carriage was in interstate commerce. (344 U.S. at 161. Continuing:

> The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency. Such an identification is necessary . . . in order that it may properly apply the state's valid police, welfare, and safety regulations to motor carriers using its highways. [*Ibid.*] [65]

Qualification statutes adopting the Model Act approach require information so that other state laws may be enforced. These meet the standards enunciated in *Fry Roofing*, and, of course, those in Union Brokerage. Hopefully, the instant case, though not specifically related to interstate commerce, can provide a format for a future extension of vitally needed state powers with respect to qualification.

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[64] For a discussion of the abortive concept of the "domiciled foreign corporation "which was included in the New York Business Corporation Act of 1961 and than removed, see Comment, 47 Corn. L.Q. 273 (1962).

[65] *Accord*, Duckworth v. Arkansas, 314 U.S. 390 (licenses for transporting liquor through state).

VI. JURISDICTION OF THE COURT

The most peculiar aspect of the case relates to the issue of jurisdiction. The Motion to Dismiss or Affirm sets forth the following:

(1) A federal question was not raised at trial or on appeal;

(2) Allenberg's raising of the federal questions via a petition for rehearing is insufficient to preserve the question for appeal to this court, *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; and

(3) The certificate secured from the Chief Justice of the Mississippi Supreme Court is deficient.

With respect to the last point, Appellee cited *Charleston Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 186 n.1, where the Court spoke directly to the certificate issue:

> The president of the Supreme Court of Appeals, in allowing the appeal to this Court, wrote a memorandum opinion to the effect that the question of the validity of the statute under the constitution was raised and decided there. Appellants urge that this indicates that the appeal is proper. While a certificate of state court made part of the record, to the effect that the Federal question in issue was decided there is *generally sufficient to sustain our jurisdiction when it is consistent with the record . . . a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite and ambiguous evidence in the record, relied upon to show that the federal question was raised.* . . . The memorandum of the President of the West Virginia court was not sufficient of itself to establish that appellants attacked a statute below, nor does the record contain any evidence which could be relied upon to show that the validity of a statute was drawn into question. (Emphasis added.)

With no evidence in the record that Allenberg *raised* a *federal question, Alderson* indicates that even a certificate

signed by the full court on this point would have been insufficient. This basic procedural deficiency is recognized in the order of December 17, 1973:

> Consideration of the jurisdictional statement is deferred to accord counsel for appellant opportunity to secure a certificate as to whether the judgment was intended to rest on an adequate and independent state ground or on federal grounds. Charleston Federal Savings & Loan Association, et. al. v. Alderson, State Tax Commission . . . . [42 L.W. 3362 (Dec. 18, 1973.)]

If jurisdiction exists, it must therefore be based on the proposition that the lower court *assumed* a federal question was before it and proceeded to consider and dispose of that issue. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.28 (1969).

For a period in excess of two months Appellant *took no action* pursuant to this order, choosing instead to file a "Supplemental Brief" on February 23 reprinting Judge Orma Smith's opinion in *Cone Mills* and requesting reconsideration of the December 17 order. Now that the case is to be heard on the merits (pending a determination of jurisdiction) Appellant and *Amicus* produce lengthy arguments with respect to a federal question being raised and/or decided. The question is appropriately asked: if these arguments are valid why was not the simple step taken to complete the certificate heretofore signed by the Chief Justice by obtaining signatures of the other members of the panel participating in the decision below? The sequence of events smacks of "an intentional relinquishment or abandonment of a known right or privilege"; the classic definition of waiver. *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

Because of the knowledgeable refusal by Appellant's counsel to take necessary steps to clarify the record, this Court is left with an ambiguous decision containing isolated references to "interstate commerce," by the lower court

interpreting a state statute and utilizing only state cases as precedent. With no federal question raised by Appellant below, the court was free to construe the statutory language as strictly or broadly as it pleased; free from review by this Court. *O'Neil* v. *Vermont*, 144 U.S. 323; *Department of Motor Vehicles* v. *Rios*, 410 U.S. 425. Thus, the situation is quite unlike a specific constitutional question argued and decided on the basis of state law, *Indiana* v. *Brand*, 303 U.S. 95, or federal statutory criteria specifically incorporated into a state statutory scheme.[66] *Flournoy* v. *Weiner*, 321 U.S. 253. Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 HARV. L. REV. 1498 (1953). What is in issue is a decision possibly construing somewhat similar clauses, one federal and the other state and unless there are *strong indications* that federal law was utilized as a basis for decision, no jurisdiction is vested in this Court. *Minnesota* v. *National Tea Co.*, 309 U.S. 551. As recently explained:

> When the deciding court has written an opinion, inquiry into the existence of ambiguity focuses on that opinion. When the basis of the decision is not explicitly set forth therein, strong indications can nevertheless be derived from the general tenor and direction of the state court's discussion, as well as from the precedent on which the opinion appears to rely. Thus, when an opinion predicates the disposition entirely on federal law, the Court will reject a contention of possible nonfederal grounding. [Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 COLUM. L. REV. 822, 832 (1962).]

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[66] Union Brokerage of course, rejects the concept of fixed constitutional criteria specifically incorporated into state qualification statutes. See Marcus v. J. R. Watkins Co., 188 So. 2d 543 (Ala. 1966): "doing business" for qualification purposes equated with *International Shoe* standards.

Accord, R STERN & E. GRESSMAN, *supra* at 127-28. The Court fully recognized this criteria when it requested a certificate on December 17. The record remains unchanged. The lower court opinion, by referring to the state statute involved and relying on state decisions must, with nothing more appearing, be presumed to rest on an adequate state ground. *New York* v. *Zimmerman*, 278 U.S. 63, 68. The record is therefore insufficient to give this Court jurisdiction.

VII. THE MOTION TO STRIKE

Appellee's Motion to Strike the brief filed by *Amicus* was not considered prior to the summer recess. In the interim, a letter addressed to the Clerk has been filed as a response. Alluding once more to what it perceives as a state interest in preventing "fraud," *Amicus* continues to speak of the "good faith" of Allenberg[67] and its right to blanket Ben Pittman and/or counsel with non-record characterization designed to show "bad faith" (at a minimum). The current allegation that opposing counsel is not the beneficiary of these remarks is irrelevent. *Henry* v. *Mississippi*, 379 U.S. 433 (on oral argument). This conclusion, however, is difficult to square with an indiscriminate use of the words "appellee" and "defendant" in the context of appearing "in this Court" with "the effrontery straight-facedly to urge . . . ." Similar insinuations exist in other allegations, the most regretable being those relating to prostitution of talents and/or being influenced by bribery or corrupt measures. Appellee requests that the Motion to Strike be decided with the merits of the case.

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[67] While the Motion is specifically directed towards scandalous material, certain portions of the brief in question fall well within other portions of Rule 40(5), *e.g.*, "burdensome [and] irrelevant." See, *e.g.*, *Brief for Amicus* 11-15; 16-19. This is especially true with respect to non-record commentary on Allenberg and its business relationships, profit margin, etc. *Ibid.*

VIII. CONCLUSION

For the reasons stated, it is respectfully submitted that the case be dismissed for want of jurisdiction, or, in the alternative, that the judgment of the Mississippi Supreme Court be affirmed.

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APPENDIX A

§ 79-3-211. Admission of foreign corporation.

No foreign business corporation for profit shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state. No foreign corporation shall be entitled to procure a certificate of authority under this chapter to transact in this state any business which a corporation organized under this chapter is not permitted to transact. A foreign business corporation for profit shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation. No foreign non-profit non-share or non-profit or non-share corporation shall be entitled to procure a certificate of authority under this chapter.

Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities:

(a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(b) Maintaining bank accounts.

(c) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such

orders require acceptance without this state before becoming binding contracts.

(e) Transacting any business in interstate commerce.

(f) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

(g) Investing in or acquiring, in transactions outside of Mississippi, royalties and other non-operating mineral interests, and the execution of division orders, contracts of sale and other instruments incidental to the ownership of such non-operating mineral interests.

§ 79-3-213. Powers of foreign corporations.

A foreign corporation which shall have received a certificate of authority under this chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this chapter, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

§ 79-3-215. Corporation name of foreign corporation.

No certificate of authority shall be issued to a foreign corporation unless the corporate name of such corporation:

(a) Shall contain the word "corporation," "company," "incorporated," or "limited," or shall contain an abbreviation of one of such words, or such corporation shall, for use in this state, add at the end of its name one of such words or an abbreviation thereof.

(b) Shall not contain any word or phase which indicates or implies that it is organized for any purpose other than

one or more of the purposes contained in its articles of incorporation.

(c) Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this chapter, or the name of a corporation which has in effect a registration of its name as provided in this chapter.

§ 79-3-217. Change of name by foreign corporation.

Whenever a foreign corporation which is authorized to transact business in this state shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of such corporation shall be suspended and it shall not thereafter transact any business in this state until it has changed its name to a name which is available to it under the laws of this state.

Sources—Code, 1942, § 5309-224; Laws, 1962, ch. 235, § 109, eff from and after January 1, 1963.

Cross References—As to amendment of articles of incorporation generally, see § 79-3-115.

§ 79-3-219. Application for certificate of authority.

A foreign corporation, in order to procure a certificate of authority to transact business in this state, shall make application therefor to the secretary of state, which application shall set forth:

(a) The name of the corporation and the state or country under the laws of which it is incorporated.

(b) If the name of the corporation does not contain the word "corporation," "company," "incorporated," or

"limited," or does not contain an abbreviation of one of such words, then the name of the corpration with the word or abbreviation which it elects to add thereto for use in this state.

(c) The date of incorporation and the period of duration of the corporation.

(d) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated.

(e) The address of the proposed registered office of the corporation in this state, and the name of its proposed registered agent in this state at such address.

(f) The purpose or purposes of the corporation which it proposes to pursue in the transaction of business in this state.

(g) The names and respective addresses of the directors and officers of the corporation.

(h) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(i) A statement of the aggregate number of issued shares itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(j) A statement, expressed in dollars, of the amount of stated capital of the corporation, as defined in this chapter.

(k) An estimate, expressed in dollars, of the value of all property to be owned by the corporation for the following year, wherever located, and an estimate of the value of the property of the corporation to be located within this state during such year, and an estimate, expressed in dollars, of the gross amount of business which will be transacted by the corporation during such year, and an estimate

of the gross amount thereof which will be transacted by the corporation at or from places of business in this state during such year.

(l) Such additional information as may be necessary or appropriate in order to enable the secretary of state to determine whether such corporation is entitled to a certificate of authority to transact business in this state and to determine and assess the fees payable as in this chapter prescribed.

Such application shall be made on forms prescribed and furnished by the secretary of state and shall be executed in duplicate by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of the officers signing such application.

§ 79-3-221. Filing of application for certificate of authority.

Duplicate originals of the application of the corporation for a certificate of authority shall be delivered to the secretary of state, together with a copy of its articles of incorporation and all amendments thereto, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

If the secretary of state finds that such application conforms to law, he shall, when all fees have been paid as in this chapter prescribed:

(a) Endorse on each of such documents the word "Filed," and the month, day and year of the filing thereof.

(b) File in his office one of such duplicate orginals of the application and the copy of the articles of incorporation and amendments thereto.

(c) Issue a certificate of authority to transact business in this state to which he shall affix the other duplicate original application.

The certificate of authority, together with the duplicate original of the application affixed thereto by the secretary of state, shall be returned to the corporation or its representative.

§ 79-3-223. Effect of certificate of authority.

Upon the issuance of a certificate of authority by the secretary of state, the corporation shall be authorized to transact business in this state for those purposes set forth in its application, subject, however, to the right of this state to suspend or to revoke such authority as provided in this chapter.

§ 79-3-225. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to transact business in this state shall have and continuously maintain in this state:

(a) A registered office which may be, but need not be, the same as its place of business in this state.

(b) A registered agent, which agent may be either an individual resident in this state whose bsuiness office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.

§ 79-3-227. Change of registered office or registered agent of foreign corporation.

A foreign corporation authorized to transact business in this state may change its registered office or change its registered agent, or both, upon filing in the office of the secretary of state a statement setting forth:

(a) The name of the corporation.

(b) The address of its then registered office.

(c) If the address of its registered office be changed, the address to which the registered office is to be changed.

(d) The name of its then registered agent.

(e) If its registered agent be changed, the name of its successor registered agent.

(f) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(g) That such change was authorized by resolution duly adopted by its board of directors.

Such statement shall be executed by the corporation by its president or a vice-president, and verified by him, and delivered to the secretary of state. If the secretary of state finds that such statement conforms to the provisions of this chapter, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of new registered agent, or both, as the case may be, shall become effective.

Any registered agent of a foreign corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the secretary of state, who shall forthwith mail a copy thereof to the corporation at its principal office in the state or country under the laws of which it is incorporated. The appointment of such agent shall terminate upon the expiration of thirty (30) days after receipt of such notice by the secretary of state.

§ 79-3-229. Service of process on foreign corporation.

The registered agent so appointed by a foreign corporation authorized to transact business in this state shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served.

If the registered agent be a corporation, service of process upon it as such agent may be made at its registered office in this state by service on the president, a vice-president, an assistant vice-president, the secretary or an assistant secretary of such registered agent.

Whenever a foreign corporation authorized to transact business in this state shall fail to appoint or maintain a registered agent in this state, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be suspended or revoked, then the secretary of state shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the secretary of state of any such process, notice, or demand shall be made by delivering to and leaving with him, or with a person having charge of the corporation department of his office, two (2) true copies of such process, notice or demand and on payment of a fee of five dollars ($5.00). In the event any such process, notice or demand is served on the secretary of state, he shall immediately cause one of such copies thereof to be forwarded by registered mail, addressed to the corporation at its principal office in the state or country under the laws of which it is incorporated.

When service is had on the secretary of state, no judgment shall be taken in the case until thiry (30) days after the date of such service.

The secretary of state shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

Nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

§ 79-3-231. Amendments to articles of incorporation of foreign corporations.

Whenever the articles of incorporation of a foreign corporation authorized to transact business in this state are amended, such foreign corporation shall, within sixty (60) days after such amendment becomes effective, file in the office of the secretary of state a copy of such amendment duly authenticated by the proper officer of the state or country under the laws of which it is incorporated; but the filing thereof shall not of itself enlarge or alter the purpose or purposes which such corporation is authorized to pursue in the transaction of business in this state, nor authorize such corporation to transact business in this state under any other name than the name set forth in its certificate of authority.

§ 79-233. Merger of foreign corporation authorized to transact business in this state.

Whenever a foreign corporation authorized to transact busness in this state shall be a party to a statutory merger permitted by the laws of the state or country under the laws of which it is incorporated, and such corporation shall be the surviving corporation, it shall, within sixty (60) days after such merger becomes effective, file with the secretary of state a copy of the articles of merger duly authenticated by the proper officer of the state or country under the laws of which such statutory merger was effected; and it shall not be necessary for such corporation to procure either a new or amended certificate of authority to transact business in this state unless the name of such corporation be changed thereby or unless the corporation desires to pursue in this state other or additional purposes than those which it is then authorized to transact in this state.

§ 79-3-235. Amended certificate of authority.

A foreign corporation authorized to transact business in this state shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in this state other or additional purposes than those set forth in its prior application for a certificate of authority, by making application therefor to the secretary of state.

The requirements in respect to the form and contents of such application, the manner of its execution, the filing of duplicate

§ 79-3-237. Withdrawal of foreign corporation.

A foreign corporation authorized to transact business in this state may withdraw from this state upon procuring from the secretary of state a certificate of withdrawal. In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the secretary of state an application for withdawal, which shall set forth:

(a) The name of the corporation and the state or country under the laws of which it is incorporated.

(b) That the corporation is not transacting business in this state.

(d) That the corporation revokes the authority of its registered agent in this state to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in this state during the time the corporation was authorized to transact business in this state may thereafter be made on such corporation by service thereof on the secretary of state.

(e) A post-office address to which the secretary of state may mail a copy of any process against the corporation that may be served on him.

(f) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, as of the date of such application.

(g) A statement of the aggregate number of issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, as of the date of such application.

(h) A statement, expressed in dollars, of the amount of stated capital of the corporation, as of the date of such application.

(i) Such additional information as may be necessary or appropriate in order to enable the secretary of state to determine and assess any unpaid fees payable by such foreign corporation as in this chapter prescribed, and a certificate of the state tax commission that the foreign corporation owes no sales taxes.

The application for withdrawal shall be made on forms prescribed and furnished by the secretary of state and shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of the officers signing the application, or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by such receiver or trustee and verified by him.

§ 79-3-239. Filing of application of withdrawal.

Duplicate originals of such application for withdrawal shall be delivered to the secretary of state. If the secretary of state finds that such application conforms to the provisions of this chapter, he shall, when all fees and sales taxes have been paid as by law prescribed:

(a) Endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof.

(b) File one of such duplicate originals in his office.

(c) Issue a certificate of withdrawal to which he shall affix the other duplicate original.

The certificate of withdrawal, together with the duplicate original of the application for withdrawal affixed thereto by the secretary of state, shall be returned to the corporation or its representative. Upon the issuance of such certificate of withdrawal, the authority of the corporation to transact business in this state shall cease.

§ 79-3-241. Revocation of certificate of authority.

The certificate of authority of a foreign corporation to transact business in this state may be revoked by the secretary of state upon the condtions prescribed in this section when:

(a) The corporation has failed to file its annual report within the time required by this chapter, or has failed to pay any fees prescribed by this chapter when they have become due and payable; or

(b) The corporation has failed to appoint and maintain a registered agent in this state as required by this chapter; or

(c) The corporation has failed, after change of its registered office or registered agent, to file in the office of the secretary of state a statement of such change as required by this chapter; or

(d) The corporation has failed to file in the office of the secretary of state any amendment to its articles of incorporation or any articles of merger within the time prescribed by this chapter; or

(e) A misrepresentation has been made of any material matter in any application, report, affidavit, or other document submitted by such corporation pursuant to this chapter.

No certificate of authority of a foreign corporation shall be revoked by the secretary of state unless (1) he shall have given the corporation not less than sixty (60) days' notice thereof by mail addressed to its registered office in this state, and (2) the corporation shall fail prior to revocation to file such annual report, or pay such fees, or file the required statement of change of registered agent or registered agent or registered office, or file such articles of amendment or articles of merger, or correct such misrepresentation.

§ 79-3-243. Issuance of certificate of revocation.

Upon revoking any such certificate of authority, the secretary of state shall:

(a) Issue a certificate of revocation in duplicate.

(b) File one of such certificates in his office.

(c) Mail to such corporation at its registered office in this state a notice of such revocation accompanied by one of such certificates.

Upon issuance of such certificate of revocation, the authority of the corporation to transact business in this state shall cease.

§ 79-3-245. Application to corporation heretofore authorized to transact business in this state.

Foreign corporations which are duly authorized to transact business in this state at the time this chapter takes effect, for a purpose or purposes, for which a corporation might secure such authority under this chapter, shall, subject to the limitations set forth in their respective certificates of authority, charters or articles of incorporation, be entitled to all the rights and privileges applicable to foreign corporations procuring certificates of authority to transact business in this state under this chapter, and from the time this chapter takes effect such corporations shall be

subject to all the limitations, restrictions, liabilities, and duties prescribed herein for foreign corporations procuring certificates of authority to transact business in this state under this chapter.

Each such corporation shall designate in its first annual report to be filed under this chapter its initial registered office and initial registered agent in this state. The resident agent for service of process on each such corporation on the effective date of this chapter shall become and be the registered agent of each such corporation until changed under the provisions of this chapter.

§ 79-3-247. Transacting business without certificate of authority.

No foreign corporation transacting busness in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this

chapter and thereafter filed all reports required by this chapter, plus all penalties imposed by this chapter for failure to pay such fees. The attorney general shall bring proceedings to recover all amounts due this state under the provisions of this section.

§ 79-3-249. Annual report of domestic and foreign corporations.

Each domestic corporation, and each foreign corporation authorized to transact business in this state, shall file, within the time prescribed by this chapter, an auual report setting forth:

(a) The name of the corporation and the state or country under the laws of which it is incorporated.

(b) The address of the registered office of the corporation in this state, and the name of its registered agent in this state at such address, and, in case of a foreign corporation, the address of its principal office in the state or country under the laws of which it is incorporated.

(c) A brief statement of the character of the business in which the corporation is actually engaged in this state.

(d) The names and respective addresses of the directors and officers of the corporation.

(e) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(f) A statement of the aggregate number of issued shares, itemized by classes, par value of share, shares without par value, and series, if any, within a class.

(g) A statement, expressed in dollars, of the amount of stated capital of the corporation, as defined in this chapter.

Such annual report shall be made on forms prescribed and furnished by the secretary of state, and the informa-

tion therein contained shall be given as of the date of the execution of the report, except as to the information required by subparagraph (g) which shall be given as of the close of business on the thirty-first day of December next preceding the date herein provided for the filing of such report. It shall be executed by the corporation by its president, a vice-president, secretary, an assistant secretary, or treasurer, and certified under the signature of one (1) of the officers signing the report as being true and correct, or, if the corporation is in the hands of a receiver or truestee, it shall be executed and certified on behalf of the corporation by the receiver or trustee.

§ 79-3-251. Filing of annual report of domestic and foreign corporations.

Such anual report of a domestic or foreign corporation shall be delivered to the secretary of state between the first day of January and the fifteenth day of April of each year, provided, that for corporations doing business on the basis of a fiscal year, such annual report shall be so delivered within three and one-half (3½) months after the end of such fiscal year, and provided further, that for such corporations the period herein specified as ending on the fifteenth day of April shall mean the period ending three and one-half (3½) months after the end of such fiscal year, except that the first annual report of a domestic or foreign corporation shall be filed between the first day of January and the fifteenth day of April of the year next succeeding the calendar year in which its certificate of incorporation or its certificate of authority, as the case may be, was issued by the secretary of state. Proof to the satisfaction of the secretary of state that prior to the fifteenth day of April such report was deposited in the United States mail in a sealed envelope, properly addressed, with postage prepaid, shall be deemed a compliance with this requirement. If the secretary of state finds that such report conforms to the requirements of this chapter, he shall file the same.

If he finds that it does not so conform, he shall promptly return the same to the corporation for any necessary corrections, in which event the penalties hereinafter prescribed for failure to file such report within the time hereinabove provided shall not apply, if such report is corrected to conform to the requirements of this chapter and returned to the secretary of state in sufficient time to be filed prior to the fifteenth day of May of the year in which it is due, or four and one-half (4½) months after the end of the fiscal year for which it is due.

§ 79-3-253. Fees and charges to be collected by secretary of state.

The secretary of state shall charge and collect in accordance with the provisions of this chapter:

(a) Fees for filing documents and issuing certificates.

(b) Miscellaneous charges.

(c) License fees.

§ 79-3-255. Fees for filing documents and issuing certificates.

The secretary of state shall charge and collect for:

(a) Filing articles of incorporation and issuing a certificate of incorporation, with a capital stock of $5,000.00 or less, . . . $25.00.

(1) Same. All articles of incorporation in excess of $5,0000.00 shall be charged for at the rate of $25.00 for the first $5,000.00 of capital stock and $2.00 per $1,000.00 additional on each $1,000.00, or part thereof, in excess of said first $5,000.00, provided no fee shall be more than $500.00.

§ 79-3-257. Miscellaneous charges.

The secretary of state shall charge and collect:

(a) For furnishing a certified copy of any document, instrument, or paper relating to a corporation, sixty cents

(60c) per page and two dollars ($2.00) for the certificate and affixing the seal thereto, with a minimum charge of three dolars ($3.00).

(b) At the time of any service of process on him as resident agent of a corporation, five dollars ($5.00), which amount may be recovered as taxable cost by the party to the suit or action causing such service to be made if such party prevails in the suit or action.

§ 79-3-259. Penalties imposed upon corporations.

Each corporation, domestic or foreign, that fails or refuses to file its annual report for any year within the time prescribed by this chapter shall be subject to a penalty of ten dollars ($10.00). Such penalty shall be assessed by the secretary of state at the time of default in such filing. The amount of the penalty shall be separately stated in notice to the corporation with respect thereto.

Each corporation, domestic or foreign, that fails or refuses to answer truthfully and fully within the time prescribed by this chapter interrogatories propounded by the secretary of state in accordance with the provisions of this chapter, shall be deemed to be guilty of a misdemeanor and upon conviction thereof may be fined in any amount not exeeeding five hundred dollars ($500.00).

§ 79-3-261. Penalties imposed upon officers and directors.

Each officer and director of a corporation, domestic or foreign, who fails or refuses within the time prescribed by this chapter to answer truthfully and fully interrogatories propounded to him by the secretary of state in accordance with the provisions of this chapter, or who signs any articles, statement, report, application or other document filed with the secretary of state which is known to such officer or director to be false in any material respect, shall be deemed to be guilty of a misdemeanor, and upon

conviction thereof may be fined in any amount not exceeding five hundred dollars ($500.00).

§ 79-3-263. Disposition of fees, charges and penalties collected by secretary of state.

All fees and charges to be collected by the secretary of state under the provisions of this chapter including the assessment and collection thereof of all penalties shall be paid into the general funds of the state treasury, less ten per cent (10%) as received thereof to be retained and used by the secretary of state as necessary expense to administer the provisions of this chapter as the secretary of state deems necessary.

§ 79-3-265. Interrogatories by secretary of state.

The secretary of state may propound to any corporation, domestic or foreign, subject to the provisions of this chapter, and to any officer or director thereof, such interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation has complied with all the provisions of this chapter applicable to such corporation. Such interrogatories shall be answered within thirty (30) days after the mailing thereof, or within such additional time as shall be fixed by the secretary of state, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual they shall be answered by him, and if directed to a corporation they shall be answered by the president, vice-president, secretary or assistant secretary thereof. The secretary of state need not file any document to which such interrogatories relate until such interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this chapter. The secretary of state shall certify to the attorney general, for such action as the attorney general may deem

appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this chapter.

§ 79-3-267. Information disclosed by interrogatories.

Interrogatories propounded by the secretary of state and the answers thereto shall not be open to public inspection nor shall the secretary of state disclose any facts or information obtained therefrom except in so far as his official duty may require the same to be made public or in the event such interrogatories or the answers thereto are required for evidence in any criminal proceedings or in any other action by this state.

§ 79-3-269. Powers of secretary of state.

The secretary of state shall have the power and authority reasonably necessary to enable him to administer this chapter efficiently and to perform the duties therein imposed upon him.

§ 79-3-271. Inspection and examination of books and records—injunction.

The secretary of state (with the approval of the attorney general) is authorized to inspect and examine, on reasonable notice and at reasonable times and places the applicable books and records of a corporation, but only when he, and the attorney general, both believe upon probable cause that such corporation is or has engaged in any illegal stock manipulation, scheme or artifice to defraud, illegal concealment of information material to the rights of shareholders or any persons proposing to purchase securities of said corporation, or any illegal or fraudulent act or acts that would impair, defeat, deny or abridge any rights of the shareholders of such corporation. The secretary of state may request the attorney general to apply for an injunction to prevent any further wrongful acts of such corporation. Provided further, that such information obtained pursuant to any investigation by the secretary of state as provided

in this section shall not be a public record except insofar as his official duty may require the same to be made public or in the event such information is required for evidence in any criminal proceedings or in any part other action of this state.

§ 79-3-273. Appeal from secretary of state.

If the secretary shall fail to approve any articles of incorporation, amendment, merger, consolidation or dissolution, or any other document required by this chapter to be approved by the secretary of state before the same shall be filed in this office, he shall, within ten (10) days after the delivery thereof to him, give written notice of his disapproval to the person or corporation, domestic or foreign, delivering the same, specifying the reasons therefor. From such disapproval such person or corporation may appeal to the Chancery Court of the First Judicial District of Hinds County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the secretary of state; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the secretary of state or direct him to take such action as the court may deem proper.

If the secretary of state shall revoke the certificate of authority to transact business in this state of any foreign corporation, pursuant to the provisions of this chapter, such foreign corporation may likewise appeal to the Chancery Court of the First Judicial District of Hinds County, by filing with the clerk of such court a petition setting forth a copy of its certificate of authority to transact business in this state and a copy of the notice of revocation given by the secretary of state; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the secretary of state or direct him to take such action as the court may deem proper.

Appeals from all final orders and judgments entered by the chancery court under this section in review of any ruling or decision of the secretary of state may be taken as in other civil actions.

§ 79-3-275. Certificates and certified copies to be received in evidence.

All certificates issued by the secretary of state in accordance with the provisions of this chapter, and all copies of documents filed in his office in accordance with the provisions of this chapter when certified by him, shall be taken and received in all courts, public offices, and bodies as prima facie evidence of the facts therein stated. A certificate by the secretary of state under the seal of his office, as to the existence or non-existence of the facts relating to corporations shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or non-existence of the facts therein stated.

§ 79-3-277. Forms to be furnished by secretary of state.

All reports required by this chapter to be filed in the office of the secretary of state shall be made on forms which shall be prescribed and furnished by the secretary of state. Forms for all other documents to be filed in the office of the secretary of state shall be furnished by the secretary of state on request therefor, but the use thereof, unless otherwise specifically prescribed in this chapter, shall not be mandatory.

§ 79-3-279. Greater voting requirements.

Whenever, with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation require the vote or concurrence of the holders of a greater proportion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control.

§ 79-3-281. Waiver of notice.

Whenever any notice is required to be given to any shareholder or director of a corporation under the provisions of this chapter or under the provisions of the articles of incorporation or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice.

§ 79-3-283. Action by shareholders or directors without a meeting.

Any action required by this chapter to be taken at a meeting of the shareholders or of the directors, respectively, of a corporation, or any action which may be taken at a meeting of the shareholders or of the directors, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the shareholders or by all of the directors entitled to vote with respect to the subject matter thereof.

Such consent shall have the same force and effect as a unanimous vote of shareholders or as a unanimous vote of directors and may be stated as such in any articles or document filed with the secretary of state under this chapter.

§ 79-3-285. Unauthorized assumption of corporate powers.

All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

§ 79-3-287. Application to existing corporations.

The provisions of this chapter shall apply to all existing corporations for profit organized under any general law of this state providing for the organization of corporations

for a purpose or purposes for which a corporation might be organized under this chapter.

Each such corporation shall designate in its first annual report to be filed under this chapter its initial registered office and initial registered agent in this state. Any resident agent for service of process on any such corporation on the effective date of this chapter shall become and be the registered agent of any such corporation until changed under the provisions of this chapter. The domicile of each such corporation on the effective date of this chapter shall become and be the registered office of each such corporation until changed under the provisions of this chapter.

§ 79-3-289. Application to foreign and interstate commerce.

The provisions of this chapter shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States.

§ 79-3-291. Effect of repeal of prior acts.

The repeal of a prior law by this chapter shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such law prior to the repeal thereof.

§ 79-3-293. Effect on Mississippi Securities Law.

Nothing contained in this chapter shall be construed to amend, repeal or modify any provision of the Mississippi Securities Law, same being sections 75-71-1 to 75-71-57, Mississippi Code of 1972.